IN THE

Supreme Court of the United States

October Term, 1972
No. 71-1134

HARRY ROADEN,

Petitioner,

vs.

COMMONWEALTH OF KENTUCKY,

Respondent,

On Petition for a Writ of Certiorari to the Court of Appeals of the State of Kentucky

Motion of Charles H. Keating, Jr., for Leave to File a Brief as Amicus Curiae in Support of Respondent with Brief Annexed

CHARLES H. KEATING, JR.,
18th Floor, Provident Tower,
One East Fourth Street
Cincinnati, Ohio 45202
Amicus Curiae

PROOF OF SERVICE

I, CHARLES H KEATING, JR., Movant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the day of September, 1972 I served copies of the foregoing Motion of Charles H Keating, Jr. for Leave to File a Brief as Amicus Curiae in Support of Respondent with Brief Annexed on the following:

(1) The Petitioner, HARRY ROADEN, by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to his attorney of record, PHILIP K. WICKER; and,

(2) The Respondent, COMMONWEALTH OF KENTUCKY, by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to its attorney of record, EDWARD W. HANCOCK.

CHARLES H KEATING, JR.
Amicus Curiae
18th Floor, Provident Tower
Cincinnati, Ohio 45202
513-381-1150

PROOF OF SERVICE

I, CHARLES H KEATING, JR., Movant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the day of September, 1972 I served copies of the fore-going Motion of Charles H Keating, Jr. for Leave to File a Brief as Amicus Curiae in Support of Respondent [illegible] the following:

(1) The Petitioner, MARVIN MILLER, by placing a copy in [illegible]

[illegible]

SUBJECT INDEX

II.

TABLE OF AUTHORITIES CITED

CASES

CASES - CONT'D

CASES - CONT'D

CASES - CONT'D

CASES - CONT'D

CASES - CONT'D

CODES & STATUTES

MISCELLANEOUS

- - - -

IN THE

Supreme Court of the United States

October Term, 1972
No. 71-1134

HARRY ROADEN,

Petitioner,

vs.

COMMONWEALTH OF KENTUCKY,

Respondent,

On Petition for a Writ of Certiorari to the Court of Appeals of the State of Kentucky

Motion of Charles H. Keating, Jr., for Leave to File a Brief as Amicus Curiae in Support of Respondent.

Charles H. Keating, Jr. (hereinafter referred to as Moving Party) respectfully moves, pursuant to Rule 42(3) of the Rules of the U. S. Supreme Court, for leave to file a brief as Amicus Curiae in support of the Respondent, Commonwealth of Kentucky. The consent of Phillip K. Wicker, Attorney for Petitioner, has been requested and was refused.

Moving Party has a special interest in the subject matter of this appeal, having devoted considerable time, study and effort to assisting law enforcement in combating the spread of obscenity in the Nation; first, as the founder and co-

counsel for Citizens for Decent Literature, Inc., and more recently as a member of the Presidential Commission on Obscenity and Pornography. Moving Party is also the Appellee in an obscenity case pending before this Court, entitled "A Motion Picture Film Entitled 'Vixen,' Russ Meyer, Eve Productions, Inc., Malibu, Inc. and Clarence P. Gall v. State of Ohio ex rel Charles H. Keating, Jr., October Term 1971, No. 71-599, as to which this Court on January 12, 1972, requested a response. The latter appeal was carried over to the 1972 October Term without this Court having taken action thereon.

In Moving Party's view, the question which is before this Court in Roaden v. Kentucky, i.e.:

> "In the absence of a prior adversary hearing, is the seizure incident to arrest of allegedly obscene material, a violation of due process?"

has no sound basis in legal logic,[1] having literally

---

1. As to the validity of Amicus' statement that there is "no sound basis in legal logic," see the shrewd observation of Justice Batjer, dissenting in Glass v. Eighth Judicial District, 486 P.2d 1180 (July 2, 1971) at 1189, regarding the anomalous result being reached:

> "In United States v. Wild, 422 F.2d 34 (2nd Cir. 1969), that court said: 'These cases (A Quantity of Copies of Books v. Kansas, 378 U.S. 205, 84 S.Ct. 1723, 12

emerged from out of nowhere. Encouraged by language of certain members of this Court, taken out of context from "prior restraint" cases, and nourished by

---

L.Ed.2d 809 (1964), and Marcus v. Search Warrants, 367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed.2d 1127 (1961)), are inapposite since they involved massive seizures of books under state statutes which authorized warrants for the seizure of obscene materials as a first step in civil proceedings seeking their destruction. The seizures in this case were of instrumentalities and evidence of the crime for which appellants were indicted and lawfully arrested. We do not believe Marcus and A Quantity of Books can be read to proscribe the application of the ordinary methods of initiating criminal prosecution to obscenity cases.' Cf. Milky Way Productions, Inc. v. Leary, 305 F. Supp. 288 (S.D.N.Y. 1969), affirmed 397 U.S. 98, 90 S.Ct. 817, 25 L.Ed.2d 78 (1970), where it was held that an adversary hearing is not a prerequisite to the validity of an arrest for obscenity. Here, on theory, Erwin Glass could have been arrested without a prior adversary hearing, locked up, and prevented from exhibiting to the public his non-obscene materials, but following the majority opinion his two films 'Wanda', the hypnotist, lashed into submission, for mature adults 'only,' and 'Title Withheld,' only for the mature adult who understands, must be granted an adversary hearing before they can be held. (Our emphasis.)

If a police officer may not seize a positive film print as the instrumentality of the crime incident to an arrest upon probable cause, should he not also be required to issue a citation rather than arrest the personal liberty of a person who is alleged to have committed any crime? See footnote 42, infra, at page 84 and the opinion of Los Angeles Superior Court Justice Thaxton Hanson (Appendix 1) which points a finger at the moral vacuum in our courtrooms.

this Court's silence on the matter when its voice was sorely needed,[2/] the spurious claim of a so-called "right to an adversary hearing" has succeeded in bootstrapping itself to its present status as a major issue for this Court's consideration.

Throughout its gestation period, this "false pregnancy" has played havoc with law enforcement

---

2. During the four years of silence since Lee Art Theatre, Inc. v. Virginia, 392 U.S. 636, 20 L. Ed.2d 1313, 88 S.Ct. 2103 (June 17, 1968), brushfire wars have developed between the state and federal judiciary in practically every state in the Nation. Representative of this open warfare on this issue is the struggle taking place in the two pornography capitals of the U.S.A.

In the East, compare New York v. Heller, 29 N.Y.2d 319, 327 N.Y.S.2d 628, 277 N.E.2d 651 (Dec. 1, 1971) and the New York State rule authorizing a seizure under an ex parte search warrant after a surreptitious viewing by a judge, certiorari granted by this Court in Heller v. New York, __ U.S. ___, 32 L.Ed.2d 115, __ S.Ct. ___ (May 15, 1972) with Bethview Amusement Corp. v. Cohn, 416 F.2d 410 (2d Cir. Oct. 6, 1969), requiring an adversary hearing before any seizure, certiorari denied 397 U.S. 920, 25 L.Ed.2d 101, 90 S.Ct. 929 (Feb. 24, 1970). Further, the result reached on appeal to the second circuit may very well depend upon the panel of judges hearing the case. Compare Bethview, supra (Hayes, Waterman, Bartels) which ordered the return of a film with U.S. v. Wild, 422 F.2d 34 (2nd Cir. Oct. 29, 1969) (Lumbard, Smith, Feinberg) which refused to disturb a conviction which was based upon evidence taken without an adversary hearing, rehearing denied 422 F.2d 38 (Feb. 2, 1970), cert. den. by this Court in 402 U.S. 986, 29 L.Ed.2d 152, 91 S.Ct. 1644 (May 17, 1971). For a modification of the rule in Heller v. N.Y., which follows the Kentucky Court of Appeals decision herein, see New York v. Morgan, 326 N.Y.S.2d 976 (Sept. 2, 1971), discussed at footnote 28, infra. See also

in the communities of this Nation. A plethora of case histories in the National Reporter Systems underscores this Merlin-inspired illusion as the smoke screen generator which has shepherded the entry of hard-core films into the neighborhood theatres and drive-ins and guaranteed their remaining there, without the reach of effective law enforcement. The condition of our newspaper movie ads reminds us daily that, because effective local

---

New York v. O'Brien, 320 N.Y.S.2d 425 (Apr. 7, 1971) where a trial court in Nassau County denied the district attorney's application for an adversary hearing prior to the issuance of a search warrant on the grounds that the New York law did not provide such a procedure. It would appear that in Lido East Theatre Corp. v. Murphy, 337 F.Supp. 1345 (Feb. 15, 1972) and the cases cited therein at footnote 8, the Federal District Court in the Southern District of New York has disregarded this Court's ruling in Perez v. Ledesma, 401 U.S. 82, 84 (Feb. 23, 1971) that:

> "The propriety of arrests and the admissibility of evidence in state criminal prosecutions are ordinarily matters to be resolved by state tribunals, see Stefanelli v. Minard, 342 U.S. 117...."

In the West, compare California v. DeRenzy, 275 Cal.App.2d 380, 79 Cal.Rptr. 777 (Aug. 1, 1969) and the California State Rule, which permits a seizure under an ex parte search warrant where supported by affidavits which focus searchingly on the subject matter, with Demich, Inc. v. Ferdon, 426 F.2d 643 (9th Cir., May 13, 1970), which requires an adversary hearing before any seizure; vacated and remanded for reconsideration in the light of Perez v. Ledesma, 401 U.S. 82, 27 L.Ed.2d 701, 91 S.Ct. 674 (Mar. 29, 1971). See also footnote 3, infra, and Los Angeles County Superior Court Judge Thaxton Hanson's opinion in Cinema Classics at Appendix A, infra.

law enforcement has been neutralized by this issue, we are presently pursuing the moral standards of biblical Sodom and Gomorrah.[3] In the process, we have succeeded in broadcasting to the world our present worth, not as the free, moral people we have always prided ourselves as being, but rather as a Nation of "slobs" which is about to succumb as the natural consequence of its own degeneracy.

This Court's recent grant of certiorari in Heller v. N.Y., 1971 October Term, No. 71-1043, and Alexander v. Virginia, 1971 October Term, No. 71-

---

3. If one case, more than the others, focuses attention on the adversary hearing issue and this Court's responsibility for the hard-core pornography which smothers this Nation, it is the Cinema Classics case in Los Angeles. See Judge Irving Hill's opinion in Cinema Classics, Ltd., a Calif. Corp. v. Busch, District Attorney for Los Angeles County, 339 F. Supp. 42, 49 (Feb. 22, 1972) touting such materials as "presumptivily First Amendment materials" and ordering the return of hard-core materials seized under a search warrant. See also, this Court's order of Mar. 20, 1972, in Busch v. Cinema Classics, ___ U.S. ___, 31 L.Ed. 2d 450, __ S.Ct.__ (Mar. 20, 1972) denying an application for a stay of the preliminary injunction therein and the memorandum opinion of Los Angeles Superior Court Judge Thaxton Hanson which followed in that case. Judge Hanson's opinion, a copy of which appears at Appendix A, points an accusing finger at the federal interference and excoriates the moral vacuum which exists in this Nation's courtrooms. Forced to hand over 13,500 reels of hard-core, pornographic films, carrying a street value of $500,000 (see Appendix A), to its depraved manufacturers, Judge Hanson asks the hard question, "Why are some 13,500 reels of hard-core pornography, found to be obscene after a full hearing and declared contraband, being ordered returned? Why? What is going on here?"

1315, both of which share a common issue with Roaden, has finally fixed the focus. Moving Party contends that, treated separately or grouped together, these three cases do not in themselves, embrace all of the subsurface problems which underlie the main issue, nor do they give proper attention to the peripheral considerations which orbit the main controversy. To lend assistance to the Court in this regard, Moving Party respectfully requests that he be granted leave to file a brief amicus curiae, setting forth arguments on the above jurisdictional question as it applies to the facts of this and other cases and other related collateral matters.

Dated: September 11, 1972

CHARLES H. KEATING, JR.
Amicus Curiae.

IN THE

Supreme Court of the United States

October Term, 1972
No. 71-1134

HARRY ROADEN,

Petitioner,

vs.

COMMONWEALTH OF KENTUCKY,

Respondent,

On Petition for a Writ of Certiorari to the Court of Appeals of the State of Kentucky

Brief Amicus Curiae of Charles H. Keating, Jr., in Support of Respondent.

Statement of the Case.

A. Background

On Monday evening, September 28, 1970, James Strunk, a Deputy Sheriff of Pulaski County, Kentucky, who had served in that capacity for "somewhere around four months", viewed a motion picture "Cindy and Donna", being exhibited on the screen of the 27 Drive-In Theatre on South Highway in Pulaski County (Appendix, hereinafter designated "A" at pg.20). At that time he was on the road outside the Drive-In, right beside it (A 21).

His presence there as pursuant to the advice of Pulaski County Sheriff Gilmore Phelps, who told him to, "Keep an eye on the movie down there ...." From that position he saw about 30 minutes of the film, "Where the girls were loving" (A 20).[4] On the following evening, Tuesday, Sept. 29, 1970, Strunk's immediate superior, Pulaski County Sheriff Gilmore Phelps, who was then serving in his 9th or 10th year of service as Chief Law Enforcement Officer of Pulaski County, paid the admission price and entered the Highway Drive-In Theatre (A 8, 9), in company with the Prosecuting Attorney for that district (A 16, 17).[5] After viewing the entire movie, Sheriff Phelps proceeded to the projection booth, where he found Petitioner Roaden operating the projection machine. He arrested Roaden, whom he recognized as the manager of the theatre, on a charge of exhibiting an "obscene" film to the general public and seized the film (A 9, 10). On the following day, Wednesday, Sept. 30,

---

4. At the trial, Deputy Sheriff Strunk viewed the film with the jury (the print which was seized incident to the arrest on the evening of Sept. 29, 1970) and thereafter testified that it was the same movie he had viewed from the road on the previous evening, Sept. 28, 1970. (A 29)

---

5. The fact of the prosecuting attorney's attendance was brought out on cross-examination. See Footnote 11.

1970, the matter was presented to the Grand Jury of Pulaski County, which returned a true bill of indictment (A 3, 4), charging Harry Roaden with a violation of Kentucky Revised Statutes, Section 436.101.[6] Kentucky Revised Statutes, Section 436.101 reads, in part, as follows:

> "(1) As used in this section . . . .
>
> (b) 'Matter' means any . . . motion picture . . . .
>
> (c) 'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matter."
>
> "(2) Any person who, having knowledge of the obscenity thereof . . . in this

---

6. The Pulaski County Grand Jury indictment read in part: "Indictment No. 4432, KRS Sect. 436.101. The Grand Jury charges: On or about the 29th day of Sept. in Pulaski County, Kentucky, the abovenamed defendant did unlawfully and wilfully publish and exhibit, or had in his possession with intent to publish and exhibit, an obscene motion picture entitled, 'Cindy and Donna.' Contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the Commonwealth of Kentucky."

state . . . publishes . . . exhibits . . . or has in his possession with intent to . . . exhibit . . . any obscene matter is punishable by fine . . . or by imprisonment in the County jail for not more than 6 months . . . ."

On October 3, 1970, (three days after the arrest, Petitioner appeared in the Pulaski Circuit Court and entered a plea of not guilty and the case was set for trial on October 20, 1970, (20 days after the arrest) (A 1).

On October 12, 1970 (12 days after the arrest), Petitioner filed a motion to suppress the film as evidence and to dismiss the indictment on two grounds [7] (A 6, 7):

"1. That the evidence was improperly, unlawfully and illegally seized, contrary to the

---

7. Petitioner did not move to regain possession of the film either as an ancillary matter in the criminal proceedings or by separate civil lawsuit. Amicus questions whether Petitioner may now press a First Amendment claim based upon unreasonable previous restraint. See Johnson v. Common. of Kentucky, 475 S.W.2d 893, 894 (Dec. 17, 1971), where the Kentucky Court of Appeals said: "Since no such step was taken in the present case, this Court is of the view that these appellants may not now complain that the state authorities retained possession of the film, since they never sought a judicial order for the return of that material...." Not every previous restraint is unlawful. U.S. v. 37 Photographs, 402 U.S. 363, 374, 28 L.Ed.2d 822, 833, 91 S.Ct. 2221 (May 3, 1971) and Point IB2, infra, at page 85.

procedure provided by Statute and the laws of the land.

"2. That without the improperly, unlawfully and illegally seized evidence an indictment would not be returnable, and therefore, should be dismissed[8/] . . . ."

Petitioner noticed his suppression motion for a hearing date of October 16, 1970 (16 days after the arrest) and arguments were heard on that

---

8. See Point IB1(a) infra, at page 71. As to whether an indictment would be returnable, absent the film and using only testimonial evidence, see Bryers v. Texas, which upheld the indictment on the basis of probable cause, but reversed the conviction after a trial on the merits on the ground that the film was indispensable evidence and had to be seen by the trier of fact. In many cases it may be impossible for law enforcement to obtain the special projection equipment which is necessary to project the film print.

In Louisiana v. Gulf State Theatres of Louisiana, Inc., et al., the district attorney brought an action under the procedure prescribed by the Abatement of Nuisances Statutes, Sect. 4711-17 of Title 13 of the Louisiana Revised Statutes, to abate as a public nuisance the showing of the "3D" Stereovision motion picture film, "The Stewardesses," The "3D" motion picture projection process requires special projection equipment which the film distributor delivers to the exhibitor with the "3D" positive film print. In this frustrating situation (lacking a means of projection) the prosecutor offered the testimonial evidence of several witnesses as to what they saw and heard. The defense saw no reason to exhibit the film to the trial court. On June 29, 1972, the Louisiana Supreme Court, by a 4-3 decision, affirmed the trial court's decision enjoining the film as a public nuisance, but one month later (July 31, 1972) granted a rehearing in the same case by the same 4-3 vote, and the matter is now pending in that court.

date and the matter taken under submission. On October 20, 1970 (20 days after the arrest) the Pulaski Circuit Court Judge overruled the motion and on the same date commenced Petitioner's trial (A 1).

B. The Trial

At the trial in the Pulaski Circuit Court, Sheriff Phelps and Deputy Sheriff Strunk were the only witnesses for the prosecution. The Petitioner testified as a witness on his own behalf.

1. Commonwealth of Kentucky — Case in Chief.

On direct examination, Sheriff Phelps testified as to the circumstances surrounding the charge: that he was the Sheriff of Pulaski County and had served two 4-year terms (A 8); that he was in his ninth or tenth year of service as Sheriff (A 9); that as Sheriff of Pulaski County he was the Chief Law Enforcement Officer of that county (A 9); that on the night of September 29, 1970, he viewed the film "Cindy and Donna" at the Highway 27 Drive-In on South 27, and observed other members of the general public there that night, but couldn't tell who they were (A 9); that he paid the admission price to gain admission to the theatre and after viewing the

film "Cindy and Donna," proceeded to the projection room of the threatre where he found the Petitioner, Mr. Roaden. He identified the Petitioner, who was in the courtroom as the person who operated the drive-in and the person whom he found operating the projecting machine in the projection room. He stated that he then arrested the Petitioner on a charge of showing an obscene movie to the general public and seized the film (A 10).

When asked to describe to the court and jury "the general nature of what the motion picture showed on the screen there at the Drive-in Theatre that night" (A 10), defense counsel Harris made the following objections: "I object to this defendant describing it because the film itself is the best evidence[9/] . . . . Mr. Phelps, of necessity would only be giving his impression or opinion, and not finding facts." (A 11) In ruling on the objection, the trial judge stated, "I am going to permit him to tell what the film was about as a general proposition, but not to go into full details, because if the picture is

---

9. Having objected to the testimonial evidence on the ground that the film itself was the "best evidence," defense counsel then objected to the introduction of the "best evidence." See Footnote 10.

exhibited to the jury, they can see the film themselves, but just for identifying, for the purpose of identifying the film that I presume will be introduced . . . ." (A 11) Thereafter, in response to the prosecutor's question, "Now, subject, Sheriff, to the court's limitations which you have heard, tell the court and jury about the film?" (A 11), Sheriff Phelps very briefly identified the contents of the film (A 12).

Sheriff Phelps then described the physical evidence which he had seized . He produced those items in the courtroom and identified the same as the films which he had taken as evidence from the Drive-In by markings thereon, made at the time of the arrest. He stated that such evidence had been in his possession and control since that time, that it was in the same condition as when it was taken as evidence, and that it had not been changed in any degree whatsoever (A 12-14). Thereafter, against the defense counsel's objections, the five reels were admitted into evidence as Exhibits 1 through 5 [10/] (A 15).

---

10. Assuming Petitioner's counsel was correct (Footnote 8) when he urged the trial court that the five reels were the "best evidence," note Professor Perkins' comments on the responsibilities of law enforcement investigators in such matters., appearing at Point IC, infra, at page 91.

On cross-examination by Defense Counsel Wicker, Sheriff Phelps stated that he had seen all of the film prior to having made the arrest and seizure. Asked if anyone was with him at the movie, he replied, "Yes, sir." Asked, "Who was with you?" he replied, "The Commonwealth Attorney Mr. Rogers" (A 16).[11] He acknowledged that at the time of the arrest and seizure of the film, he did not have a warrant (A 16, 17), nor had any prior determination been made before a magistrate or a judge that the film was obscene. Asked if, at the time he seized the film and made the arrest, he

---

11. Suppose Prosecuting Attorney Rogers had taken the stand as a witness during the Commonwealth's case in chief and told the court and jury that on Sept. 29, 1970, he was at the drive-in and had viewed the film in its entirety with Sheriff Phelps and had advised Sheriff Phelps, prior to arrest and seizure, that in his judgment it was obscene and in violation of the Kentucky Obscenity Statute. See in this regard, the result reached in Oregon v. Watson, ___ Ore. ___, 414 P.2d 337 (May 18, 1966) where the Oregon Supreme Court held such testimony to be prejudicial error:

> "The prosecution called as an expert witness the then incumbent District Attorney of the County. He personally had purchased the book and had signed the complaint. The District Attorney was permitted to testify, over timely objection, that in his opinion the book in question satisfied all statutory requirements . . . . It is manifest error to permit a witness, who has no special qualifications so to testify, to tell the jury that in his opinion a crime has been committed."

knew what the definition of obscene was under the Kentucky Statute, he answered that he had read it and, asked what does it say, replied, "Obscene means to the average person applying contemporary standards the predominant appeal of the matter taken as a whole is to the prurient interest a shameful or morbid interest in nudity, sex or excretion which goes beyond customary limits of candor and description or representation of such matter" (A 17).

On redirect examination, Sheriff Phelps testified that at the time the picture was shown and the Petitioner arrested, he knew the manager of the theatre to be the Petitioner, Mr. Roaden (A 19).

Deputy Sheriff James Strunk testified, on direct examination, that he was a deputy under Sheriff Gilmore Phelps (A 19) and had served in that capacity for somewhere around four months (A 20); that on Sept. 28, 1970, Sheriff Gilmore Phelps advised him to keep an eye on the movies in Pulaski County (A 20);[12]

---

12. Note that Deputy Sheriff Strunk, pursuant to Sheriff Phelps' order to "keep an eye on the movie in Pulaski County" viewed the film on the evening prior to its being viewed by Sheriff Phelps and the prosecuting attorney. It is reasonable to conclude from such evidence that the viewing by the latter officials was for the purpose of checking out Strunk's report.

that upon the night of Sept. 28, 1970, he had occasion to see about 30 minutes of the moving picture "Cindy and Donna" at the Highway 27 Drive-In on South Highway 27 (A 20); that at that time he was not in the Drive-In but was on the road outside the Drive-In right beside it (A 21).

The film "Cindy and Donna" was thereafter shown to the jury at the Virginia Theatre in Somerset, Kentucky (A 21), with the court instructing the sheriff's personnel in charge of the jury to arrest anyone for contempt of court who should be found to violate his rule that "there will be no demonstrations, there will be no words spoken . . . no acts of any kind done by and between any of the attorneys, the officers or anyone there. . . . " (A 23)

Upon returning from the viewing of the film, Sheriff Gilmore Phelps was recalled to the stand by the Commonwealth and testified that he had seen "Cindy and Donna" at the same time that it was shown to the jury at the Virginia Theatre and that he recognized it as the same one he had seen at the Highway 27 Drive-In Theatre on South 27th on Sept. 29, 1970 (A 27). Upon questioning by

the court on its own motion,[13] Sheriff Phelps testified that he took the films from the courtroom to the Virginia Theatre and that they were in his custody at all times from the time he took the films from the courtroom until he brought them back to the courtroom (A 27, 28).

James Strunk was recalled to the stand by the Commonwealth[14] and testified that he had seen "Cindy and Donna" at the same time it was shown to the jury at the Virginia Theatre and that he recognized it as the same motion picture that he viewed on the evening of Sept. 28, 1970, at the Highway 27 Drive-In Theatre from his position on the road outside the theatre (A 28, 29).

---

13 and 14. The trial court and the prosecuting attorney's respect for the technical rules governing the chain of evidence is a basic requirement of criminal justice. As noted by Professor Perkins (See Point IC, infra, at page 91) the rules which mandate the preservation of evidence are of equal benefit to the prosecution and to the defense. Were this Court to prevent the State of Kentucky from allowing the film print to be seized at the time of the arrest, will it not be complicating the trial issues in all motion picture obscenity cases? How is a state witness going to connect up what he saw at the time of the arrest with any autoptical evidence which might thereafter be offered? Similarly, what pitfalls will the defense encounter in laying a proper foundation? How will the finder of fact relate what one witness says about the content to what another witness says about the content?

2. Harry Roaden – The Defense

The Petitioner, Harry G. Roaden, testified on his own behalf and stated on direct examination that he was 36 years old and manager of the Highway 27 Drive-In Theatre (A 29); that he had been a resident of Somerset in Pulaski County, Kentucky, since 1953, and had been a theatre manager except for a short period during 1953 to 1955, when he was in the service; that on Sept. 28, 1970, he was manager of the Highway 27 Drive-In Theatre; that he did not own the theatre, nor did he have any control over the pictures that were booked but played whatever comes in; that no persons under 18 were admitted to see the film except babes in arms (A 30) and that such knowledge came to him from his cashier. Asked if he had any knowledge of the contents of the film, he stated that he had had no chance to see the film and that the first complaint he had received about the film was when Sheriff Phelps came to the projection booth. He stated he had been in the projection booth about two minutes when Sheriff Phelps arrived and that he had gone there because the cartoon was on upside down (A 31).

On cross-examination, he stated that the theatre was owned by Highway 27 Drive-In, Inc.

and that his uncle O. G. Roaden was one of the stockholders but that he was not (A 31); that he was hired to operate the theatre (A 30, 31) and a booking combine booked the pictures and a truck from Cincinnati dropped the films off at the door (A 32). He stated that the film "Cindy and Donna" showed on Sunday, Sept. 27, Monday, Sept. 28, and Tuesday, Sept. 29, 1970, and that during those three showings he did not see the motion picture. Asked if it was not his responsibility as manager and operator of that theatre to see that the movies that came there are projected on the screen at the scheduled time, he answered, "Yes, it is" (A 34). He stated that he did not stay at the box office all the time (A 34) but went over the field to see if everything was all right, such as to see if anyone was making a racket and tearing things up; that lots of times he had to be in the snack bar and during intermissions he made announcements from the projection room on the speaker system (A 35).

At the conclusion of Petitioner Roaden's cross-examination testimony, the defense rested.

In his arguments to the jury, defense counsel availed himself of the special provisions of the

Kentucky Revised Statute, Sect. 436.101(8) under which a jury is permitted to render a special verdict that the subject matter is obscene (See, Instruction 1 at A 45), while at the same time returning a general verdict of innocence, as where the "mens rea" evidence might not convince the jury beyond a reasonable doubt that the person charged was criminally responsible. (See Instructions 3 and 6, at A 45, 47).[15]

Addressing himself to the two separate issues which were before the jury, i.e., (1) The nature of the film "Cindy and Donna" and (2) the guilt or innocence of the Petitioner, defense counsel made the following arguments:

---

15. Kentucky Revised Statute, Sect. 436.101(8) provides as follows:

> (8) The jury, or the court, if a jury trial is waived, shall render a general verdict, and shall also render a special verdict as to whether the material named in the charge is obscene. The special verdict or findings on the issue of obscenity may be: 'We find the _____ (title or description of matter) to be obscene' or 'We find the _____ (title or description of matter) not to be obscene,' as they may find each item is or is not obscene."

This type of statute should have special appeal to certain justices on this Court who appear to have a volition against upholding state criminal convictions in obscenity cases. See the comments of the Texas Court on this type of statute in Bryers v. Texas, 480 S.W.2d 712, at 719, footnote 11.

"If the film which you saw yesterday was all that was on trial here, I would not be here, I would be good enough to tell you at the outset that, in behalf of Mr. Roaden, I am not going to get up here and defend the film observed yesterday, nor the revolting scenes in it or try to argue or persuade you that those scenes were not obscene . . . ."[16] (A 36).

"Now, ladies and gentlemen, I don't have any doubt but that you will find the contents of that film obscene;[17] but I do have doubt that you will find Harry Roaden guilty as the court tells you in Instruction No. 3, of wilfully and unlawfully exhibiting to the gen-

---

16 to 20. Defense counsel's remarks to the jury amount to admissions by the Petitioner that, based solely upon the autoptical evidence, Sheriff Phelps had "probable cause" to believe the Kentucky Obscenity Law was being violated. This is consistent with the failure of defense counsel to move to restore the film (see Footnote 4). While it has generally been recognized throughout our legal history that courts ordinarily will not order the return of property which is contraband, or whose possession is contrary to law, U.S. v. Jeffers, 342 U.S. 48, 96 L.Ed. 59, 72 S.Ct. 93 (1951), a notable deviation has been the notorious unconcern of certain members of this modern Court regarding contraband in the form of obscene matter.

eral public an obscene motion picture film entitled 'Cindy and Donna,' the defendant having knowledge of the obscenity thereof - having knowledge of the obscenity thereof;" (A 37)

"While this film leaves little to recommend it, nothing to recommend it,[18] the State has failed to prove that Harry Roaden had any knowledge that the film was obscene (A 37)."

"Now, my friend, Mr. Rogers over here is very persuasive and no doubt he is going to get up and review with you scene by scene the disgusting elements of this film[19] but if he does do that, that still does not mitigate the requirements that the State proved beyond a reasonable doubt that this man had knowledge of the obscenity of the film, nor has there been a line, phrase, or word of evidence offered by anyone that anyone ever complained to Mr. Roaden that the film was obscene." (A 38)

"I submit to you that although you may find that this film was obscene[20] that you can still find Harry Roaden

not guilty, because it has not been proven beyond a reasonable doubt that he knew the contents of this film. Thank you very much." (A 38)

On October 21, 1970, the jury retired to the jury room and after due deliberation returned into open court the following verdict (see Judgment of the Pulaski Circuit Court in Petition For a Writ of Certiorari at page 23):

"This jury finds the motion picture Cindy and Donna obscene. Foreman Paul Elliott. We, the jury find the defendant Harry Roaden guilty as charged, set his punishment $1,000.00 fine and six months in jail. Paul Elliott, Foreman."

Upon appeal to the Court of Appeals of Kentucky, Petitioner urged as reversible error, the denial by the Circuit Court of his motion to suppress the film as evidence (Petition for Certiorari, Pages 25-27). On June 25, 1971, the Court of Appeals of Kentucky rendered its opinion in Roaden v. Kentucky, 473 S.W.2d 814, affirming the conviction. Rejecting Petitioner's argument concerning the illegality of the seizure, the Kentucky Court held the decisions of this Court in Marcus v. Search Warrants of Property, 367 U.S. 717 (1961), and A Quantity of Copies of Books v.

Kansas, 378 U.S. 205 (1964) were not applicable saying:

> "Those decisions relate to seizure of allegedly obscene material for destruction or suppression, not to seizure incident to an arrest for possessing, selling, or exhibiting a specific item."

The Court of Appeals of Kentucky also stated that the decision of this Court in Lee Art Theatre v. Virginia, 392 U.S. 636 (1968) "is not applicable here," because in Lee Art Theatre ". . . the film had been seized pursuant to a search warrant, not incident to an arrest."

On December 17, 1971, the Court of Appeals of Kentucky denied a rehearing and issued its mandate affirming the Petitioner's conviction (Petition for Certiorari, Page 31). On Dec. 28, 1971, Petitioner filed a motion to stay execution and enforcement of the mandate, which motion was sustained on January 14, 1972, for a period of 90 days and has since been extended.

Summary of Argument.

I

The manner in which the Petitioner has phrased the jurisdictional question in his Petition for Writ of Certiorari, namely, "In the absence of a prior adversary hearing, is the seizure incident to arrest of allegedly obscene material a violation of due process of law?" obscures the basic legal proposition which is before this Court. Amicus submits that to analyze and resolve this multi-phased jurisdictional question requires that the responsive proposition be more narrowly drawn and refined. If Petitioner has a claim for denial of due process, he must be able to delineate the duties he claims were breached, and show where the Commonwealth has done or failed to do that which the law requires. By way of reply, Amicus' analysis is pointed in the opposite direction, i.e., toward establishing that the Commonwealth of Kentucky has breached no duties under the Constitution.

Due process was accorded Petitioner at each of the three stages of the criminal proceedings herein: (1) At the arrest; (2) when the film print was seized, and (3) when the film print was admitted into evidence.

Petitioner was arrested without a warrant for

showing an obscene movie to the general public. For the Commonwealth to prevail in warrantless arrests, three principles must be established: (1) A valid law; (2) statutory authority for the arrest, and (3) probable cause for the arrest.

The public policy of the Commonwealth of Kentucky is strongly aligned against the public exhibition of obscene motion picture films. KRS Sect. 436.101(2), expressing that public policy, is clearly valid. Moreover, the special verdicts on (1) obscenity, and (2) guilt or innocense required by the Kentucky statute, offer a solution to the impasse reached by this Court on the scienter issue, and more than satisfy due process requirements. Defense counsel availed himself of these provisions of the law at trial. The jury weighed the evidence and arguments, and found against the Petitioner on both issues.

By virtue of a specific statute and the ruling case law in Kentucky, Sheriff Phelps had the authority to arrest a person without a warrant for a misdemeanor committed in his presence. The decisions of this Court indicate that rules such as these governing arrests are authorized by the Constitution to meet the practical demands of effective criminal investigation and law enforcement.

Whether a particular arrest without a warrant is constitutional or not depends solely upon whether, at the moment the arrest was made, the officer had "probable cause" to make it. Probable cause exists where the facts and circumstances within the arresting officer's knowledge and of which he has reasonable trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. When the constitutionality of an arrest is challenged it is the function of this Court to determine whether the facts available to the officer at the moment of the arrest would warrant a man of reasonable caution in the belief that an offense had been committed.

Petitioner claims that no obscenity arrest can be validly executed until the question of obscenity has first been litigated in a civil court of law. That claim is highly unorthodox. A lone, dissenting judge in Ohio v. Albini stated the claim differently as "an unlawful delegation to the police of the plenary duty of the courts to determine whether there is probable cause to believe films obscene after arguments by both parties." Those arguments were foreclosed by this Court's decision in Gable v. Jenkins, 397 U.S. 592.

It seems obvious from Gable v. Jenkins that the State could have arrested Petitioner on the obscenity charge and, without seizure, proven their case by testimonial evidence of what the officer saw and heard.

The Kentucky Court of Appeals acted well within the scope of its authority when it decided that an obscenity arrest did not call for an exception to the general rule under Kentucky law as to warrantless arrests, where Kentucky procedures permitted the Petitioner to contest the issue of probable cause as an ancillary matter in the criminal trial, either by way of motion to suppress or restore, or in an independent civil action to restore the property. The Kentucky Court of Appeals' solution is the majority view at the present time.

In deciding this question, this Court must also keep in focus the due process considerations which support the Kentucky State Obscenity Statute. Those include the universal verity that obscenity is a public nuisance which is abatable under the law, and the ethical values shared by this Nation as a whole as defined in the state, federal, and city morality laws. These values exist for the benefit of the family unit which is at the very core of government in our Judeau-

Christian culture.

The public policy of the Commonwealth of Kentucky is strongly opposed to the public exhibition of obscene films and it was Sheriff Phelps' sworn duty to enforce that policy and uphold the law. Whether Sheriff Phelps' arrest without a warrant was constitutional or not depended upon whether or not he had probable cause to make the arrest. The factual issue of probable cause depends upon two factors: (1) The nature of the film itself -- the autoptical evidence, and (2) the capacity of a peace officer to evaluate obscenity in the light of the Roth standards. Petitioner's claim that the sheriff lacked such capacity was decided otherwise by the Kentucky Court of Appeals.

The record shows (1) the jury verdict; (2) the trial summation of defense counsel which concedes obscenity, and (3) a failure to attack the jury verdict on appeal. Where it is conceded that the nature of the film was sufficient to establish guilt of the charge, it must follow, as a matter of law, that the same was sufficient under traditional concepts to establish "probable cause" as a matter of fact. Independent of the personal capacity of Sheriff Phelps to make value judgments regarding the Roth standards, the record shows that Sheriff Phelps viewed the film in its

entirety in company with the County Prosecutor and it is reasonable to infer therefrom that the latter official was present at the Drive-In for the specific purpose of giving legal assistance to Sheriff Phelps on the obscenity issue.

Society has a legitimate interest in suppressing crime and detecting criminals which requires (1) that evidence be preserved intact; (2) that autoptical evidence be preferred over testimonial evidence, and (3) that the right of officers to seize the instrumentality of the crime itself be upheld as a deterrent to crime.

When there is an arrest for the exhibition of an obscene film, an emergent condition exists -- the positive film print which was used for projection must be preserved intact so as to prevent alteration or cutting. The state cannot purchase a copy nor, if they were able to, could it be assured that the same would be the identical version. Some courts have called the print "indispensable evidence." In others, such as California, the courts have called it the "best evidence." In any event, it is the instrumentality of the crime, and it has been recognized many times that, without it, the prosecution must fail, or be subject to reversal upon appeal. To prohibit the seizure of such evidence, under these circumstances, would com-

pletely frustrate criminal prosecution.

It is not a "search" where an officer observes contraband which is clearly visible from a place where an officer has a right to be. No search warrant is needed where the object sought is visible, open, and obvious to anyone employing his eyes. Even were this not so, the seizure herein was within the reach authorized by Chimel v. California, 395 U.S. 752.

Granted the law's preference for search warrants, a state is not required to resolve all such issues on the practicability of obtaining a search warrant. The Commonwealth of Kentucky was entitled under Ker v. California, 374 U.S. 231, to rely on this Court's express invitation for state courts to develop workable rules governing arrests and seizures and was authorized to choose a state rule under which administrative "probable cause" would be examined judicially after an arrest by a peace officer.

By waiving the motion to restore the film print prior to the criminal trial, Petitioner is now foreclosed from arguing prior restraint and First Amendment principles.

Petitioner was not deprived of due process when the positive film print was admitted into evidence at the trial. The Commonwealth attorney

during his case in chief showed a complete evidence chain of the film's custody from the time it was first taken into the possession of Sheriff Phelps at the time of the arrest until it was received in evidence as Exhibits 1 to 5, and shown to the jury.

The search for objective truth requires that the law search out and preserve as autoptical evidence that which constitutes the instrumentality of the crime. Such trustworthy evidence will not only serve to convict the guilty, but it may also, in a proper case, serve to free the innocent.

II

The past decisions of this Court do not support Petitioner's claim that the denial of an adversary hearing prior to arrest and seizure amounts to a violation of due process of law. Petitioner's claim is of recent origin, having evolved out of the 1966 October Term reversals and the language of certain members of this Court, taken out of context in Marcus v. Kansas City Search Warrants, 367 U.S. 717 (1961), A Quantity of Books v. Kansas, 378 U.S. 205 (1964), and Lee Art Theatre v. Virginia, 392 U.S. 636 (1968).

The A Quantity of Books case concerned not a criminal prosecution but an auxiliary means of attacking obscene materials -- civil suppression of all copies through injunction, a form of relief

given limited approval in Kingsley Book, Inc. v. Brown, 354 U.S. 436 (1957), such injunctive statutes are not always surrounded by the due process safeguards which automatically attend criminal prosecutions. The seizure of all copies, as in A Quantity of Books, pursuant to an injunction may impinge directly on the First Amendment, whereas a seizure of a single copy as evidence, antecedent to a criminal prosecution, is cognizable under the Fourth Amendment.

A chronological history of the cases on this issue in the lower courts demonstrates that misunderstandings have been placed upon the A Quantity of Books decision, stemming from a failure to distinguish its prior restraint civil aspects from criminal cases involving a seizure to obtain evidence for a criminal prosecution. Such misunderstandings have brought about a rash of bad law and chaos in this area of the law, including confrontations between state and federal courts of the order which resulted in the enactment of U.S. Code, Sections 2281 and 2284.. One comes away from a study of these cases with the conclusion that the results obtained depend not upon established principles of law but rather upon the personal philosophy of the members of the Court writing the opinion.

Amicus submits that a state is not required to create an exception to the traditional right of a police officer to seize evidence incident to an arrest. A distinction must be drawn between administrative probable cause determinations and judicial probable cause determinations. If the state judiciary prefers to test the officer's judgment after arrest by providing for an immediate adversary hearing procedure after arrest, there can be no serious claim of a constitutional infringement.

If, for no other reason than practicality and necessity, the Kentucky procedure must prevail. With the judicial work load being what it is, this Court cannot afford to make it a constitutional requirement that the trial court undertake adversary proceedings inquiring into every film, magazine, etc., that is manufactured, exhibited, sold, or offered for sale or exhibition, to see whether or not there is probable cause to believe the same to be the proper subject for an obscenity charge.

ARGUMENT.

Introduction

The manner in which the Petitioner has phrased the jurisdictional question in his petition for Writ of Certiorari, i.e.:

> "1. In the absence of a prior adversary hearing, is the seizure incident to arrest of allegedly obscene material, a violation of due process of law?"

obscures the basic legal proposition which is before this Court and the starting point and direction in which the legal analysis must proceed if a rational solution is to be arrived at. To explain the obfuscation created by Petitioner's manner of stating the multi-phased question, amicus would refer this Court to Brumbaugh's Treatise on "Legal Reasoning and Briefing," Copyright 1917, Bobbs-Merrill Co., wherein the author states at page 16:

> "And first of all, the initial sine qui non to the process of correct reasoning and argumentation is the proposal of a proposition. The basis of this demand rests upon the purpose of argumentation. Argumentation is a process to determine

> the truth or falsity of some relation. To do this successfully requires that the particular relation be set out carefully for the purpose - it must be clear, single, and alone, and the only known method of securing such a result is to embody the relation in that formula of thought and language, known as the subject-predicate combination, that is to affirm a given thing to belong to a given subject. This formulation is known as a proposition. Plain as this requirement seems to be, it is an indisputable fact that labored contentions have often vanished entirely when the ground of disagreement has been finally and formally reduced to a proposition. The tendency is to disagree upon provocation and to find no basis of disagreement upon reflection, analysis, and definition . . . ." (Our emphasis.)

The obvious predicate to any legal proposition which seeks to respond to the jurisdictional question herein is that something "violates due process." One might question, however, what the "subject" is or should be in the subject-predi-

cate response to this question as phrased. Does it concern (1) the arrest, or (2) the seizure of the film, or (3) the type of the subject matter, or (4) a combination of the three aforementioned law enforcement measures, or (5) something else?

Petitioner's manner of stating his responsive proposition, namely:

> "The denial of an adversary hearing prior to seizure of the film in this case is inconsistent with the decisions of this Court, and amounts to a flagrant violation of due process of law."

provides no formula of thought and language which allows for a reasonable analysis or face to face confrontation with the fundamental issues. Language employed by this Court in other cases cannot be taken out of context and loosely extended so as to create a new rule of law, where to do so will draw in question other basic rules of law which have been long regarded as fundamental to our legal system. That other courts may have done so and concluded that an adversary hearing is necessary, offers little value as precedence where the underlying rationale of those decisions will not in-

dependently stand up under close scrutiny.

Amicus submits that to analyze and resolve this multi-phased jurisdictional question in a proper manner requires that the responsive proposition be more narrowly drawn and refined. If the Petitioner has a claim for denial of due process, he must be able to delineate the duties he claims were breached, and set forth at what specific point in the legal proceedings the Respondent has erred, i.e., at what point the Commonwealth has done that which the law prohibits, or has failed to do that which the law requires. In an effort to achieve that result by way of reply, Amicus has pointed his analysis in the opposite direction, i.e., toward establishing in a step by step analysis, that the Commonwealth, in administering the criminal laws of the State of Kentucky herein, has breached no duty owed Petitioner under the Federal Constitution.

I

DUE PROCESS OF LAW WAS ACCORDED THE PETITIONER AT EACH OF THE THREE STAGES OF THE CRIMINAL PROCEEDINGS BEING CONTESTED HEREIN, i.e: (1) AT THE TIME OF PETITIONER'S ARREST ON A CHARGE OF SHOWING AN OBSCENE MOVIE TO THE GENERAL PUBLIC: (2) WHEN THE POSITIVE PRINT USED BY PETITIONER TO PROJECT THE VISUAL IMAGES AND SOUND TRACK WAS SEIZED INCIDENT TO THE ARREST AS EVIDENCE BEARING ON THE CHARGE, AND (3) WHEN THE POSITIVE FILM PRINT WAS ADMITTED INTO EVIDENCE AT THE TRIAL, FOLLOWING THE COMMONWEALTH'S LAYING OF THE PROPER FOUNDATION IN THE CHAIN OF EVIDENCE.

A. Petitioner Was Not Deprived Of Due Process When He Was Arrested by Pulaski County Sheriff Phelps on a Charge of Showing an Obscene Movie to The General Public.

Sergeant Phelps arrested the Petitioner without a warrant for showing an obscene movie to the general public. For the Commonwealth to prevail in a warrantless arrest against a claim of denial of due process of law, three broad principles of law must be established: (1) A valid law; (2) statutory authority for the arrest, and (3) probable cause for the arrest. See New York v. Lake Ronkonkoma Theatre, 59 Misc. 2d 438 at 442 (Mar. 6, 1969).

1. A Law Which Proscribes The Public Exhibition of Obscene Films And Designates The Same To Be a Misdemeanor Crime is Constitutional As A Valid Exercise of The Police Power of the State.

The public policy of the Commonwealth of Kentucky is strongly aligned against the public exhibition of obscene motion picture films. K.R.S. Sect. 436.101 (2) makes it a misdemeanor to exhibit an obscene motion picture film to the general public. That section provides, in part:

> "(2) Any person who, having knowledge of the obscenity thereof . . . in this state exhibits, or has in his possession with intent . . . to exhibit . . . any obscene matter is punishable by fine of not more than $1,000.00 plus . . . or by imprisonment in the county jail for not more than six months, or by both such fine and imprisonment . . .. ."

Upon a conviction for a second offense, the penalty is doubled, and on a third conviction, the matter becomes a felony.

That such conduct may be lawfully proscribed as a crime under the police powers reserved to the states by the Tenth Amendment to the Federal Constitution is beyond question. See Alberts

v. Calif., 354 U.S. 476, 485, 493, (June 22, 1957;[21] reaffirmed by this Court during the 1970 October Term in U.S. v. Reidel, 402 U.S. 351, 355, 28 L. Ed.2d 813, 817, 91 S. Ct. 1400 (May 3, 1971), where this Court said, at page 355:

> "The Court considered this sufficiently clear to warrant summary affirmance of the judgment of the United States District Court for the Northern District of Georgia, rejecting claims that under Stanley v. Georgia, Georgia's obscenity statute could not be applied to booksellers. Gable v. Jenkins, 397 U.S. 592, 25 L.Ed.2d 595, 90 S.Ct. 1351 (1970)."

---

21. Just 15 years ago, a majority of this Court noted that such was the universal judgment." In Roth-Alberts, 354 U.S. 475, 485, this Court stated:

> "But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, in the obscenity laws of all of the 48 states, and in the 20 obscenity laws enacted by the Congress from 1842 to 1956, This is the same judgment expressed by this Court in Chaplinsky v. New Hampshire, 315 U.S. 568, 571, 572, 86 L. Ed. 1031, 1035, 62 S.Ct. 766; . . . ." (Our emphasis.)

See also footnote 29, infra, at page 60.

(a) The Kentucky Statutory Procedure, In Permitting The Jury (or Court) To Give The Benefit of The Doubt to Persons Accused Under the Law, Amply Meets Due Process Requirements.

In the past, this Court has been troubled by the "mens rea" aspect of criminal proceedings in obscenity cases. See Smith v. California, 361 U. S. 147, 4 L.Ed.2d 205, 80 S. Ct. 215 (Dec. 14, 1959) and note, in particular the distressing result reached in the Redrup, Austin and Gent cases, cert. granted, limited to the "scienter" issue in Redrup v. New York, 384 U.S. 916, 16 L.Ed.2d 438, 86 S.Ct. 1362 (Apr. 25, 1966) but decided on other grounds in a no-clear majority decision in Redrup v. New York, 386 U.S. 767, 18 L.Ed.2d 515, 87 S. Ct. 1414 (May 8, 1967). The special verdict requirements of the Kentucky Statute, set forth at footnote 15, offer a solution to this impasse. Had KRS, Sect. 436.101(8) been a part of the Redrup facts, this Court could have resolved the question as to which jurisdiction had been noted in Redrup (see 16 L.Ed.2d 438).

Defense counsel availed himself of the special provisions of KRS Sect. 436.101(8) under which a jury is permitted to render a special verdict that the subject matter is obscene, while at the same time returning a general verdict of inno-

cense, as where the "mens rea" evidence might not convince the jury beyond a reasonable doubt that the person charged was criminally responsible. (See defense arguments in Statement of the Case, supra, at page 22.). The jury of 12 persons weighed the evidence and the arguments, and thought otherwise. (See Statement of the Case, supra, at page 25).

2. Under Kentucky Law, Sheriff Phelps As A Peace Officer Had The Authority To Arrest a Person Without A Warrant for A Misdemeanor Committed In His Presence.

At Common Law, an arrest for an offense less than a felony could not be made without a warrant unless it also involved a breach of the peace, using the latter phrase in the narrow sense of a public offense done by violence, or one causing or likely to cause an immediate disturbance of public order. A few of the modern statutes limit the authority of the peace officer to arrest without a warrant for a crime committed in his presence to the same extent as it was limited at Common Law; but in a great majority of the states at the present time, a peace officer has authority under the statutes to arrest for any public offense committed in his presence. Perkins, Elements of Police Science, at 250; 1 Antieau, Modern Constitutional Law, at 262.

This Court has recognized that the states are not precluded from developing workable rules governing arrests to meet "the practical demands of effective criminal investigation and law enforcement." Ker v. Calif., 374 U.S. 23, 34, 10 L.Ed.2d 726, 738, 83 S.Ct. 1623 (June 10, 1963) and in Johnson v. U.S., 333 U.S. 10, 15, 92 L.Ed. 436, 441, fn. 5, 68 S.Ct. 367 (1948) has stated that: "State law determines the validity of arrests without warrants." It has generally been recognized that where a statute so permits, a peace officer may lawfully arrest without a warrant one who has committed or is committing a misdemeanor in his presence or within his view, even though it does not amount to a breach of the peace, 6 C.J.S., Arrests, Sect. 6, at page 589, and such procedures traditionally have been thought to be constitutional. Johnson v. U.S., 333 U.S. 10, 92 L.Ed. 436, 68 S.Ct. 367 (1948). Following the majority rule, the Commonwealth of Kentucky, by statute, granted such authorization to peace officers. KRS Sect. 431.005(1) provides, in part:

> "A peace officer may make an arrest . . . without a warrant when a . . . misdemeanor is committed in his presence . . . ."

Ingle v. Commonwealth, 264 S.W. 1088, 204 Ky. 518; Rawlings v. Commonwealth, 230 S.W. 529, 191 Ky. 401; Fugate v. Commonwealth, 219 S.W. 1069, 187 Ky. 564; Commonwealth v. Chaplin, 211 S.W. 2d 841, 307 Ky. 630; Commonwealth v. Lewis, 217 S.W. 2d 625, 309 Ky. 276; Butcher v. Adams, 220 S.W. 2d 398, 310 Ky. 205; Commonwealth v. Hagen, 464 S.W. 2d 261.

3. Whether A Particular Arrest Without A Warrant Is Constitutional Or Not Depends Upon Whether At The Moment The Arrest Was Made, The Officer Had "Probable Cause" To Make It.

In Ker v. California, 374 U.S. 23, 34, 10 L. Ed.2d 726, 739, 83 S.Ct. 1623 (June 10, 1963), it was recognized that, in order for an arrest without a warrant to be lawful under the Constitution, it had to be based upon "probable cause."[22/]

In Draper v. U.S., 358 U.S. 307, 3 L.Ed.2d 327, 79 S.Ct. 329 (1959), this Court recognized that "probable cause" as the name implies, involves probabilities; that these are not technicals, but are

---

22. While it has been suggested in a different context (in the home) that warrantless probable-cause arrests may not be made in the absence of exigent circumstances and that, given the opportunity, the arresting officer must seek a warrant, the case law in this area holds otherwise. See Mr. Justice White dissenting in an opinion in which the Chief Justice joined in Coolidge v. New Hampshire, 403 U.S. 443, 511, footnote 1, 29 L. Ed.2d 564, 609, footnote 1, 91 S.Ct. 2022.

the factual and practical considerations of every day life on which reasonable and prudent men, not legal technicians act; and that probable cause exists where the facts and circumstances within the arresting officers' knowledge and of which they have reasonable trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.

The standards applicable to the factual basis supporting the officer's probable-cause assessment at the time of the challenged arrest are at least as stringent as the standards applied with respect to the magistrate's assessment. Whiteley v. Warden of Wyoming State Penitentiary, 401 U.S. 560, 566, 28 L.Ed.2d 306, 312, 91 S.Ct. 1031 (Mar. 29, 1971). Such standards, however, do not require that quantum or quality of proof which is necessary to establish guilt, "Probable cause" for an arrest may exist even though the person arrested turns out to be innocent. Henry v. U.S., 361 U.S. 98, 102, 4 L.Ed.2d 134, 138, 80 S.Ct. 168 (Nov. 23, 1959).

The question is not whether the person responsible for the arrest thought the facts to constitute probable cause, but whether the Court thinks that such facts constituted probable cause. Director General of Railroads v. Kastenbaum,

263 U.S. 25, 68 L.Ed. 146, 44 S. Ct. 52 (1924). When the constitutional validity of an arrest is challenged, it is the function of this Court to determine whether the facts available to the officer at the moment of the arrest[23] would warrant a man of reasonable caution in the belief that an offence had been committed. Beck v. Ohio, 179 U.S. 89, 13 L.Ed.2d 142, 148, 85 S. Ct. 223 (1964).

4. The Petitioner Is In Error When He Claims That the "Probable Cause" Determination Which Must Precede and Which Authorizes An Arrest for An Obscenity Crime Is The Exclusive Province of The Judiciary.

The Petitioner's attack herein on the arrest without a warrant does not center on traditional "probable cause" concepts; rather it flows from the highly unorthodox claim that "probable cause" in movie cases may not be determined by either a peace officer or a county prosecutor, and that no obscenity arrest can be validly executed until the question of obscenity has first been li-

---

23. Petitioner's attack, both in the Court of Appeals below and here, does not draw in issue "the facts available to the officer at the moment of the arrest." His argument is that such an inquiry is not apposite, and that, as a matter of law, in a case such as this, no set of facts will justify a warrantless arrest by an officer.

tigated in a civil court of law.[24] Analytically speaking, the Petitioner's claim is more succinctly stated in the dissent of Justice Brown of

---

24. What is Petitioner prepared to say about the policy of the law which gives the grand jury the right to determine "probable cause?" The grand jury indictment against Petitioner was returned on Sept. 30, 1970, the day after the arrest. See Ex Parte U.S., Pa., 53 S.Ct. 129, 287 U.S. 241, 77 L.Ed. 283 and 22 C.J.S. Criminal Law, Sect. 345 at p. 893, reading:

> "The finding of an indictment, fair on its face, by a properly constituted grand jury, conclusively determines the existence of probable cause . . . ." (Our emphasis.)

See also 22 C.J.S. Criminal Law, Sect. 356, at p. 916, reading:

> "Under the Federal Rules of Criminal Procedure, Rule 30(b)(3) 18 U.S.C.A. where the prosecution is by indictment, the indictment constitutes conclusive proof of reasonable cause . . . ."

In California v. Luros, 92 Cal. Rptr. 833, 480 P. 2d 633 (Feb. 18, 1971) the California Supreme Court reinstated a grand jury obscenity indictment saying, at p. 636:

> "It is not necessary, however, that evidence of contemporary community standards be received on the issue of probable cause. (See Aday v. Superior Court, supra, 55 Cal.2d at pp. 798-799, 13 Cal. Rptr. 199, 362 P.2d 47.) A determination of obscenity may therefore be made by a grand jury, insofar as the issue of probable cause is concerned, without the necessity of receiving evidence as to such standards." (226 Cal.App.2d at p. 531, 38 Cal. Rptr. at p. 206.)

See also California v. Cimber, 76 Cal.Rptr. 382, 384 (Feb. 10, 1969) and California v. Sarnblad, 103 Cal. Rptr. 211, 215 (July 20, 1972).

the Ohio Supreme Court in Ohio v. Albini, 31 Ohio St.2d 27, at 34 (July 5, 1972) [25] wherein he stated the basic proposition to be as follows:

> "The holding of the majority today constitutes an unlawful delegation to the police of the plenary duty of the courts to so determine whether there is probable cause to believe the films obscene after all parties have had an opportunity to express and present to the best of their ability the Roth considerations. Although the seizure of the film in question was incident to an arrest, the arrest itself - and hence the seizure - is invalid. In

---

25. In the Albini case, several members of the Columbus Ohio Police Department entered the theatre, viewed segments of the film, arrested the manager and seized one copy of the film. In affirming Albini's conviction, the Ohio Supreme Court agreed with the rule of law adhered to by the Kentucky Court of Appeals in its judgment below.

The probable cause issue which precedes arrest is an administrative matter for the law enforcement officer or agency. See Ohio v. Shackman, 278 N.E.2d 61, 63 (May 20, 1971) where the court said:

> "The procedure requested by the defendant would place the court in the position of a law enforcement officer or agency . . . in effect the defendant wants the court, in an adversary hearing to determine if there is probable cause to believe a crime has been committed and that an arrest should be made or evidence seized. This is not the function of the court." (Our emphasis.)

the absence of a prior judicial hearing to determine probable cause to believe the film obscene, the arrest is the product of the unlawful delegation of authority. . . ."

Such an argument, however, was foreclosed by Gable v. Jenkins, 397 U.S. 592, 25 L.Ed.2d 595, 90 S.Ct. 351 (1970), relied upon by this Court in U.S. v. Reidel, supra, at page 355.[26] The basis of the attack in the Federal District Court in Gable v. Jenkins, 309 F.Supp. 998, at 1001, was the appellant's claim that the Georgia statute was "unconstitutional" in that it did not provide for a prior judicial hearing before arrest. In Gable, the Federal District Court noted that any question as to the admissibility of illegally obtained evidence, seized incident to an arrest, was an independent question which was unrelated to the adversary hearing issue and that, where a prosecution under the state statute

---

26. See also Milky Way Productions, Inc. v. Leary, 305 F. Supp. 288, 296-297, affirmed by this Court in New York Feed Co. v. Leary, 397 U.S. 98, 25 L.Ed.2d 78, 90 S.Ct. 817; Gornto v. Georgia, 178 S.E.2d 894, 896 (Dec. 3, 1970), cert. den. 402 U.S. 933, 28 L.Ed.2d 868, 91 S. Ct. 1525 (Apr. 26, 1971); U.S. v. Fragus, 428 F. 2d 1211 (5th Cir.). Compare the contrary analysis of Milky Way and Fragus in New York v. Morgan, 326 N.Y.S.2d 976, 980 (Sept. 2, 1971) and Johnson v. City of Rochester, Minn., 197 N.W.2d 244, 246 (Apr. 28, 1972).

could be "based on other legally obtained evidence," an adversary hearing was not necessary.

It seems obvious from Gable v. Jenkins, that it would have been possible for the State of Kentucky to prosecute Roaden and avoid the "adversary hearing" issue by the simple expediency of making the arrest without seizing the film.[27] Under that strategy, the prosecuting attorney, however, would have had to bargain away the use of autoptical evidence (the film) during his case in chief, for the more expedient testimonial evidence of Phelps as to what he saw depicted on the public screen and heard at the time of the arrest.[28] It should be noted in this regard

---

27. Several prosecutors, in attempting to avoid the "adversary hearing" hurdle, have abandoned the use of autoptical evidence in favor of the more expedient testimonial evidence and other combinations. See Calif. v. Goulet, 98 Cal. Rptr. 782 (Oct. 28, 1971), Calif. v. Enskat, 98 Cal. Rptr. 646 (Sept. 21, 1971), Bryers v. Texas, 480 S.W.2d 712 (May 31, 1972), Longoria v. Texas, 479 S.W.2d 689 (Feb. 16, 1972). Respondent submits that for this Court to fashion a rule which would make autoptical evidence less available would be a step backward in the advance of police science and the search for truth. See Perkins, Elements of Police Science, referred to in Point IC, infra, at page 91.

---

28. See footnote 8. See also New York v. Morgan, 326 N.Y.S.2d 976 (Sept. 2, 1971) where a New York police officer paid $5.00 admission fee to the Metropolitan Theater on 14th Street and viewed a film entitled "Anna's Banana", which ran 20 minutes and depicted the following, at p. 978:

(This footnote is continued on the next page)

that when the Commonwealth gave an indication that it was proceeding in that direction, Petitioner's counsel, Mr. Harris, was quick to place the following "best evidence" objection (see Statement of Facts, supra, at page 14):

"Your Honor, I object to this defend-

"a female masturbating by use of a cucumber . . . fellatio and cunnilingus . . . followed by an explicit act of sexual intercourse, toward the end of which, the male withdrew his organ and ejaculated in full view on the screen." He arrested the defendant without a warrant but did not seize the film. Judge Ringel denied the motion to dismiss, calling the subject matter as described "autoptically obscene" and holding, at page 980: "where probable cause exists to arrest for displaying an alleged hardcore motion picture film to the public an arrest without a warrant is lawful. There is no need for prior judicial scrutiny to validate such an arrest . . . ."

For a reply to Judge Ringel's and Justice Stewart's subjective "I know it when I see it" low watermark, see Federal District Judge Pettine's opinion in U.S. v. 50 Magazines, 323 F.Supp. 395 at 402:

> "It is not an overstatement to say that one's own tastes, values and standards have been molded by a set of stimuli which are unique to him and to his cultural milieu, and those standards inevitably influence one's particular judgment as to what constitutes hard-core pornography . . . ." (Our emphasis.)

Amicus submits that the average American - yes, even a policeman - does know "lewdness" when he sees it. "Lewdness," after all, is what we have been talking about for 15 years, is it not? See Alberts v. Calif., 354 U.S. 476, 488; and Justice Harlan, concurring in Alberts v. Calif., at 501-503, and dissenting in Lee Art Theatre v. Virginia, 392 U.S. 636, at 638.

ant) describing it because the film itself is the best evidence. Mr. Phelps, of necessity, would only be giving his impression or opinion, and not finding facts . . . ."

Recalling this Court's advice in Roth-Alberts, supra, that it was the "universal judgment" of civilized nations that obscenity should be restrained, Amicus submits that the Kentucky Court of Appeals, as the highest court in that state, acted well within the scope of its authority and responsibility when it decided that an obscenity arrest did not call for an exception to the general rule expressed in Commonwealth v. Lewis, 217 S.W.2d 625, 626, 309 Ky. 276 (Feb. 1, 1949) that:

"(2) evidence discovered by a search of the person, or his belongings in his immediate presence, upon his being legally arrested, is competent and admissible; (3) that an officer may lawfully make an arrest . . . if the misdemeanor is committed in his presence - from which it follows that any evidence discovered or found by the officer arresting the misdemeanorant will be competent under rule 2, supra . . . ."

where Kentucky procedure permitted the defendant to contest the issue of probable cause as an ancillary matter in the criminal case by way of motion to suppress or restore, or in an independent civil action to restore the personal property. (See footnote 7.) Notwithstanding the utter confusion in this area, the Kentucky Court of Appeals' solution is the majority view at the present time. See Missouri v. Hartstein, 469 S. W.2d 329, 332-334 (Apr. 12, 1971), reversed on other grounds in Hartstein v. Missouri, __ U.S. ___, 30 L.Ed.2d 539, 92 S.Ct. ___ (Dec. 14, 1971); Wisconsin v. Kois, 188 N.W.2d 467, 471 (June 29, 1971), reversed on other grounds in Kois v. Wisc., ___ U.S. ___, 33 L.Ed.2d 312, 92 S.Ct. ___ (June 26, 1972); Wisconsin v. O'Connell, 192 N.W.2d 201, 205-206 (Dec. 14, 1971); Ohio v. Albini, 31 Ohio St.2d 27, 28 (July 5, 1972). See New York v. Morgan, 326 N.Y.S.2d 976, 980 (Sept. 2, 1971), and compare New York v. Heller, 277 N. E.2d 651 (Dec. 1, 1971); cf. Washington v. Rabe, 484 P.2d 917, 920 (Apr. 6, 1971) (affidavit and arrest warrant), reversed on other grounds in Rabe v. Washington, ___ S.Ct. ___, 31 L.Ed.2d 258, 92 S.Ct. ___ (Mar. 20, 1972); New Jersey v. Osborne, 285 A.2d 43, 46 (D.C.Ct. of Appeals, Dec. 10, 1971) (affidavit and search warrant);

North Carolina v. Bryant, 183 S.E.2d 824, 825 (Oct. 20, 1971) (affidavit and arrest warrant); U.S. v. Green, 284 A.2d 879, 882 (Dec. 20, 1970) (affidavit and arrest warrant); Scott v. Frey, 330 F.Supp. 365, 367, (E.D.La., N.Orleans Div., June 30, 1971) (affidavit and arrest warrant); contra, Johnson v. City of Rochester, Minn., 197 N.W.2d 244, 247 (Apr. 28, 1972); Colorado v. Harvey, 491 P.2d 563, 564 (Dec. 6, 1971); Glass v. 8th Judicial District, 486 P.2d 1180, 1181 (July 2, 1971). While the California rule is contrary when a particular class of motion picture film is involved, see Flack v. Municipal Court of Anaheim, 56 Cal.2d 981, 429 P.2d 192, 59 Cal.Rptr. 872 (July 3, 1967), the California procedure authorizes police officer affidavits in support of arrest and search warrants. See Calif. v. DeRenzy, 275 Cal. App.2d 380, 79 Cal.Rptr. 777 (Aug. 1, 1969), hearing denied by the California Supreme Court on Sept. 24, 1969. For an outline of the arrest procedure in Los Angeles County, see Federal District Judge Andrew Hawk's opinion in Schackman v. Arnebergh, 258 F.Supp. 983, 989-990 (Sept. 27, 1966).

It is Amicus' basic contention, that in deciding this question, this Court must also keep in focus the due process considerations which support

the Kentucky State Obscenity Statute and procedures herein employed. Such would include the universal verity that lewdness and obscenity are public nuisances which are abatable under the law, and the ethical values shares by this Nation as a whole, as defined in the legislative halls and documented in state and federal statutes and city ordinances. This Court has on many occasions stressed community ethical values as the basis for constitutional adjudication. Adamson v. California, 332 U.S. 46, 91 L.Ed. 1903, 67 S.Ct. 1672 (Justice Frankfurter's concurring opinion). Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 470, 91 L.Ed. 422, 67 S. Ct. 374 (concurring opinion). In Solesbee v. Balkom (1950), 339 U.S. 9, 16, 27, 94 L.Ed. 604, 70 S.Ct. 457, reh. den. 339 U.S. 926, 94 L.Ed. 1348, 70 S.Ct. 618, Justice Frankfurter wrote that due process

> "embodies a system of rights based on moral principles so deeply imbedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history. Due process is that which comports with the deepest notions of what is fair and right and just. The more fundamental the beliefs are, the less likely they are to

> be explicitly stated. But respect for them is of the very essence of the Due Process Clause. In enforcing them this Court does not translate personal views into constitutional limitations. In applying such a large untechnical concept as 'due process,' the Court enforces those permanent and pervasive feelings of our society as to which there is compelling evidence of the kind relevant to judgments on social institutions."

The values of the culture, Justice Frankfurter added, can often be detected from the practices in the states. He illustrated the point in this fashion: "The manner in which the states have dealt with this problem furnishes a fair reflection, for purposes of the Due Process Clause, of the underlying feelings of our society about the treatment of persons who become insane while under sentence of death." The relevant historical facts under consideration encompass this Nation's ethical values, as set forth in the well-knit pattern of city, state and federal laws, relating to public sexual conduct (such as laws dealing with nudity, fornication, prostitution, indecent exposure, sodomy, solicitation of unnatural sex act, etc.) Those values

exist for the benefit of the family unit which is at the very core of government in our Judeau-Christian culture. See also footnote 29.

5. Sheriff Phelps Had "Probable Cause" To Make The Arrest.

(a) Sheriff Phelps Had A Right and Duty Under The Kentucky Statutes To Make A Value Judgment As To Whether The Film Was Obscene.

The public policy of the Commonwealth of Kentucky is strongly opposed to the public exhibition of obscene films and it was Sheriff Phelps' sworn duty to enforce that policy and uphold the law.[29] See Point I, A 1 and Hosey v. City of Jackson, 309 F. Supp. 527 at 534, footnote 9 (Jan. 22, 1970), where the court said:

> "The right and even the duty of police officers to seize the evi-

---

29. See footnote 21. Were this Court now (when hard-core pornography is so rampant) to apply its reasoning in earlier mass seizure and prior restraint cases, such as Marcus v. Kansas City Search Warrants, 367 U.S. 717 (1961) and A Quantity of Books v. Kansas, 378 U.S. 205 (1964) (when the presence of obscenity of a lesser degree was only beginning to be felt) it would be guilty of fundamental error, for it would run contrary to the basic truth that this Nation was not constructed in a moral vacuum. The possibility of such a basic philosophical error is suggested in the recent dictum appearing in the last paragraph of the majority opinion in U.S. v. Reidel, 402 U.S. 351, 28 L.Ed.2d 813, 818, 91 S. Ct. 1410 (May 3, 1971) and is epitomized by the last paragraph thereof, reading "Roth and like

dence which was the very means or vehicle of the commission of a crime committed in the officers' presence is not, in this Court's opinion, affected by the holding in Chimel. . . ."

The record shows that nine year veteran Sergeant Phelps, Pulaski County's chief law enforcement officer, instructed his deputy, James Strunk, to keep an eye on the movies at the 27 Drive-In Theatre and that thereafter, Deputy Strunk viewed "Cindy and Donna" for about 30 minutes from the road outside the drive-in and saw the part "where the girls were loving." The following night Sheriff Phelps in company with the prosecuting attorney for the district paid the admis-

---

cases pose no obstacles to such developments." Amicus submits that the contrary holds true and that there is, as a matter of law, an inherent civil right which inheres in each citizen by virtue of his national citizenship in this Judeau-Christian Nation, to be free from the unnatural and debasing influence of hard-core pornography, such as was encountered by the Dunkle family in the Hughes case (see footnote 42) -- at least, that is an advantage which Amicus understood to flow from our heritage, the Nation's obscenity laws and the decision handed down by this Court in Roth v. U.S., 354 U.S. 476, 485 (1957) on the "universal judgment that obscenity should be restrained." See also Justice Harlan's views in Roth v. U.S., supra, at 508 re the federal role where hard-core pornography is found.

sion price and entered the Highway Drive-In Theatre where they viewed the entire film.[30] Thereafter, Sheriff Phelps proceeded to the projection booth where he arrested the Petitioner, who was operating the projector, whom he also recognized as the manager of the drive-in.

Whether Sheriff Phelps' arrest of the petitioner without a warrant is constitutional depends upon whether or not at the time of the arrest he had "probable cause" to make the arrest on the obscenity charge. That "factual" issue depends upon two factors (1) the nature of the film itself - the autoptical evidence, which was the subject of the arrest, and (2) the capacity of a peace officer to evaluate the obscenity of the film in light of the Roth standards and his personal observations. See Schmerber v. Calif., 384 U.S. 757, 769, 16 L.Ed.2d 908, 918, 86 S. Ct. 1826, (June 20, 1966). If it was that brand of pornography which Justice Stewart defined and describes in subjective terms as "I know it when I see it" or that type which several

---

30. At least one court has said that in order for the misdemeanor to be committed "in the presence" of the officer so as to authorize a warrantless arrest, the peace officer must see the entire film. See Cambist Films, Inc. v. Duggan, 298 F.Supp. 1148 at 1152 (Apr. 28, 1969).

jurists have called "obscene per se,"[31] the film could be said to be at one end of the obscenity spectrum; if it is of a less offensive nature, the autoptical evidence may not speak so loudly, and the film would be somewhere else along the spectrum. To the extent that the capacity

---

31. The test for obscenity per se is stated in Morris v. United States, 257 A.2d 341 (Dec. 2, 1969):

> "If reasonable men could not differ and they could come to but one conclusion, i.e., that the material or performance is sexually morbid, grossly perverse, and bizarre, without any artistic or scientific purpose or justification, then the Government on its case in chief need not offer any evidence of national community standards."

See also Wilhoit v. U.S., 279 A.2d 505, cert. den. 30 L.Ed.2d 546 (Dec. 14, 1971) (Douglas would grant cert. and set the case for argument); Mitchum v. State of Florida, 251 S.2d 298 at 301 (Aug. 12, 1971); U.S. v. Womack, 111 U.S. App. D.C. 8, 294 F.2d 204, cert. den. 365 U.S. 859, 81 S.Ct. 826, 5 L.Ed.2d 822 (Mar.27, 1969); U.S. v.Wild, 422 F.2d 34 (Oct. 29, 1969), cert. den. 402 U.S. 986, 91 S.Ct. 1644, 29 L.Ed.2d 152, rehrg. den. 403 U.S. 940, 91 S.Ct. 2242, 29 L.Ed.2d 720 (June 21, 1971); Mitchum v. State of Florida, 244 S.2d 159, 160 (Jan. 26, 1971); Collins v. State Beverage Dept., 239 S.2d 613, 616; Marks v. State of Florida, 262 S.2d 479 (May 23, 1972); Kaplan v. U.S., 277 A.2d 477 at 479 (May 10, 1971); Illinois v. Ridens, 282 N.E.2d 691 at 695 (Mar. 21, 1972); State of Minn. v. Getman, 195 N.W.2d 827 at 829 (Mar. 17, 1972); Justice Herndon dissenting in Harmer v. Tonylyn Productions, 100 Cal. Rptr.576, 579 (Mar. 2, 1972); United Theatres of Florida v. State ex rel Gerstein, 259 S.2d 210, 212 (Feb. 15, 1972); U.S. v. Miller, 455 F.2d 899 at 902 (Mar. 22, 1972). See also Justice Sullivan speaking in Boreta Enterprises, Inc. v. Dept. of Alcohol Beverage Control, 2 Cal. 3d 85, 84 Cal.Rptr. 113, at 123 (Feb. 26, 1970).

of the person evaluating the film may be in issue, Petitioner erroneously assumes that a peace officer is relegated to a classification which is incapable of making a value judgment in the entire spectrum of such potential evidence,[32] which will satisfy the test enunciated in Roth v. U.S., 354 U.S. 476. The argument which Petitioner urges herein was recently made to the Ohio Supreme Court and rejected in Ohio v. Albini, supra, where Justice Herbert, speaking for six of the Ohio Supreme Court Justices, said as to that proposition:[33]

---

32. There is nothing inherently wrong with a state policy which authorizes a peace officer to make a warrantless arrest for obscenity so long as the procedural law permits a person so arrested to contest the "probable cause" determination either in an ancillary proceeding in the criminal prosecution or in a separate civil action. See Footnote 7, supra, at page 11 , and text at Point IB2, infra, at page 85 .

---

33. The case for the police officer was also stated by Common Pleas Judge Pryatel in Ohio v. Dornblaser, 267 N.E.2d 434 (Mar. 8, 1971), at 438:

> "Upon review of the authorities, we cast our lot with those who hold that the requirement to conduct adversary hearings on 'obscene' films offered for sale before an arrest or prosecution can be effected is unnecessary and that the absence of such a hearing affects neither the validity nor the legality of the arrest or the indictment that followed.

"The adoption of appellant Albini's contention in this regard would emasculate the efforts of the General Assembly to discourage those who would profiteer through the commercial exploitation of sex by publicly exhibiting motion picture film, the dominant theme of which appeals to a prurient interest in sex . . . ."

In a footnote at page 28, the Court noted:

"2. Essentially, it appears to be the contention of counsel for appellants

---

"To hold that the seller, of the films sought to be suppressed here, should be accorded adversary proceedings before arrest and indictment can be accomplished is to scoff at our obscenity laws and the public they were passed to protect. Nor do we believe that the First and Fourteenth Amendments of the Constitution need be construed to forge a ring of protection around such purveyors of pornography. We see no constitutional reason why these 'salesmen' should be given the consideration of prior adversary hearings for we find no abridgement of their rights or privileges by such denial. It is our opinion that the law should not erect another barrier for the police to hurdle in their already difficult responsibility to curb obscenity and that these purveyors should not be given a prior hearing to ascertain whether their product is sufficiently hard-core pornography to warrant prosecution. Therefore, the Motion to Suppress for lack of prior adversary hearing is overruled."

that two trials, each with a full right of appeal, are required for final conviction of an offense of this nature, regardless of whether the facts would otherwise constitute obvious proof of guilt; first, a hearing to determine whether the officer may be permitted to make an arrest, file charges and take physical custody of the obscene material for evidentiary purposes and, second, the criminal trial itself. In response to a question posed during oral argument of this cause, appellant's counsel estimated that a final adjudication of the first hearing in cases such as the one at bar would require at least two years. Moreover, just how the physical evidence could be adduced at this first hearing without prior 'seizure' thereof is not clear since we cannot assume that a potential criminal defendant would freely volunteer to supply such . . . ."

(b) Sheriff Phelps Was Entitled To Rely Upon The Legal Counsel of the Prosecuting Attorney Who Attended The Movie With Him.

Independent of the issue re the capacity of a peace officer (in this case, the Sheriff) to make value judgments as to obscenity crimes, the record demonstrates that other "facts and circumstances within the arresting officer's knowledge and of which he had reasonable trustworthy information . . . existed which were sufficient to warrant a man of reasonable caution in the belief that an offense had been committed." Draper v. U.S., supra. In the case herein, Sheriff Phelps, viewed the film in its entirety in company with the County Prosecutor. It is reasonable to infer from the present state of the record that the latter official was present at the drive-in for the specific purpose of giving legal assistance to Sheriff Phelps on the obscenity issue.

(c) Petitioner Having Conceded Factual Obscenity As To The Criminal Charge Is Precluded From Denying That "Probable Cause" For The Arrest Existed.

The state of the record on this appeal is unusual in that the Petitioner, both at the trial and on appeal to the Court of Appeals of Kentucky (and in his brief herein) makes no claim that the

film "Cindy and Donna" is not obscene. Further, the defense counsel's arguments to the jury (see Statement of Facts, supra, at footnotes 10 to 14) are an admission of "Probable" obscenity which Amicus submits, in this case, is equivalent to "Probable cause."

While the film is not before this Court on its merits, that fault is of the Petitioner's making. The record is, however, showing (1) The jury verdict, (2) the trial summation of defense counsel, which concedes obscenity, and (3) the failure to attack the jury finding on appeal. Where "probable cause" depends upon the nature of the subject matter, which was viewed by the Sheriff and Prosecutor at the time of the arrest, and it is conceded after trial on the merits that such subject matter is sufficient to establish guilt of the charge, it must follow, as a matter of law, that the evidence was also sufficient under traditional concepts, to establish "probable cause" for the arrest.

B. Petitioner Was Not Deprived of Due Process When The Positive Print Used by Petitioner to Project The Audio Sound and Visual Images Was Seized Incident to the Arrest as Evidence Bearing on the Charge.

1. Legitimate Interests of Society Require That The Autoptical Evidence Used To Project the Audio Sound and Visual Images On the Screen Be Preserved Against Alteration or Destruction.

Society has a legitimate interest in suppressing crime and detecting criminals which requires (1) that evidence of the crime, namely, the motion picture projection print, be preserved against alteration or destruction; (2) that the motion picture projection print, as autoptical evidence, be favored over the testimonial evidence of law enforcement as to what was seen and heard, inasmuch as faulty judgment resulting from disability in one or more of the senses, may draw in question the integrity of the later, and (3) that the deterrent effect of the criminal laws, which attends public recognition of a peace officer's right to take immediate possession of the instrumentality of crime (the motion picture projection print) as evidence, should be given great weight in evaluating defensive tactics which frivolously draw that right in question. In a parallel consideration in Breithaupt v. Abram, 352 U.S. 432, 439, 1 L.Ed.2d 448, 453, 77 S.Ct. 409 (Feb. 25, 1957), this Court, in affirming the right of state authorities to extract blood in a warrantless seizure from an unconscious person so as to prove him under the influence of alcohol and responsible for an auto accident, held:

"As against the right of an individual that his person be held inviolable, even against so slight an intrusion as is involved in applying a blood test of the kind to which millions of Americans submit as a matter of course nearly every day, must be set the interests of society in the scientific determination of intoxication, one of the great causes of the mortal hazards of the road. And the more so since the test likewise may establish innocence, thus affording protection against the treachery of judgment based on one or more of the senses. Furthermore, since our criminal law is to no small extent justified by the assumption of deterrence, the individual's right to immunity from such invasion of the body as is involved in a properly safeguarded blood test is far outweighed by the value of its deterrent effect due to public realization that the issue of driving while under the influence of alcohol can often by this method be taken out of the confusion of conflicting contentions." (Emphasis ours.)

(a) The Emergent Condition Requires That The Alleged Instrumentality Of The Crime Be Preserved In Its Challenged Form.

The same emergent condition that was said to exist at the time of the arrest and seizure of a blood sample in Schmerber v. Calif., 384 U.S. 757, 16 L.Ed.2d 908, 919, 86 S.Ct. 1826 (June 20, 1966) presents itself as to evidence in the form of a motion picture projection print when there is an arrest for the exhibition of an obscene film.

It has been said that the film itself is "indispensable evidence."[34] "Indispenable evidence is that without which a particular fact cannot be proved," Witkin, California Evidence, Copyright 1958, at page 5. It is a well known fact that sexually oriented motion picture films are often altered by adding or deleting scenes. The absolute

---

34. In Cambist Films, Inc. v. Duggan, 298 F. Supp. 1148, 1152, footnote 4 (W.D. Pa.) (Apr. 28, 1969), Federal District Judge Dumbauld pointed to the need for the immediate preservation of evidence:

> "The retention of one print as evidence is reasonable and not oppressive. In view of the fact that the film itself is perhaps the best evidence, or at least indispensable evidence, on the question as to its nature, and of the fact that films are often cut or altered for showing at different theatres, it is important to establish the exact content of the film as exhibited on the occasion giving rise to the prosecution . . . ."

necessity of retaining an exact copy of the content of the film as shown at the time of the commission of the alleged offense is obvious. To require that the film be brought into court or that arrangements be made for a private showing provides no guarantee against cutting or alteration in the interim.[35]

To instruct a state that its police officers or prosecutors, after viewing an obscene film, may not make an immediate arrest, but must leave the theatre and report its contents to a judicial officer, would completely frustrate the state's legitimate right to prohibit the public showing of

---

35. During 1970, Amicus and others assisted the City of Atlanta in a civil action asking for an injunction against the film, "Sandra, the Making of a Woman." On Oct. 16, 1970, the film was viewed by Atlanta, Georgia, law enforcement and on Oct. 21, 1970, a court order was issued and served on the theater, requiring them to bring the film before the court. When the film was finally produced on Nov. 6, 1970, another version was tendered to the court. At least 500 feet had been cut from one of the scenes (5 min.), as was later proved to the court, using a film continuity, the still photographs of which had been taken by law enforcement on Oct. 16, 1970. An attempt, thru depositions, to pin down the responsibility for the cutting was unsuccessful. The trial court finding that the film was obscene was affirmed by the Georgia Supreme Court. The matter did not go beyond the Georgia Supreme Court. Were this Court to uphold the claim of Petitioner herein, the already difficult task of getting an obscenity case to trial would be further complicated by an additional issue: "Which film was shown on the date in question?"

obscene films.[36/]

---

36. In Hosey v. City of Jackson, 309 F. Supp. 527, 534, 535 (S.D.Miss., Jackson Div.) (Jan. 22, 1970) Federal District Judge Nixon, speaking for the majority of a three-judge Federal District Court, analyzed the social needs in the light of the evidentiary problems present in such cases:

> "The film itself is unquestionably the best evidence in any criminal prosecution for the public showing of an obscene movie. More importantly, however, it is a well known fact that moving picture films may be and often are altered by adding or deleting one or more scenes for showing at a particular theater or exhibition. The absolute necessity of retaining an exact content of the film as shown at the time of the commission of the alleged offense is obvious. . . .
>
> "This Court is of the opinion that any judicial hearing prior to the seizure of an allegedly obscene film at the time of exhibition would completely frustrate the purpose and operation of the Mississippi statute prohibiting the exhibition of obscene movies. Certainly, if a prior judicial hearing were required, it would be necessary for the hearing judge to view the film as exhibited on the occasion giving rise to the prosecution. To require a judge to proceed from one theater to another or attend numerous showings to another or attend numerous showings of a film at a particular theater with the mere possibility of viewing an obscene version is untenable. Furthermore, to require that the film be brought into Court or that arrangements be made for a private showing of the film in a particular theater provides no guarantees against the cutting or alteration of the film prior thereof. Finally, if police officers, after viewing an obscene film, were required to leave the theater in order to obtain a judicial determination on the question of obscenity by merely reporting the contents to the proper judicial officer, a judicial deter-

(This footnote is continued on the next page)

How else may the state obtain the indispensable evidence?[37] In most cases, the state cannot

---

mination under such conditions would not only be extremely difficult and subject to error, but by the time a seizure could be made, the film might be altered or even shipped to another theater or location. This would be particularly true in so-called 'quickie movies' or 'premiere performances,' the same or any versions of which might never again be shown at the same location. A procedure which is not unreasonable and not oppressive should not be condemned so as to completely frustrate a state's legitimate right to prohibit the public showing of obscene movies.

"The necessity of the seizure of an obscene movie at the time of showing cannot be compared to the seizure of obscene literature because books or magazines can always be purchased and brought before a court for a judicial hearing before a seizure is accomplished. Furthermore, literature does not enjoy the same possibility of easy deletion and alteration as is the case with a motion picture. Several movements of the cutter's hand can completely change the content of an exhibited obscene version of a movie and thereby eliminate any successful criminal prosecution."

---

37. In Bazzell v. Gibbens, 306 F. Supp. 1057, (E.D. Louisiana, Baton Rouge Division) (Dec. 9, 1969), Chief Judge West made the following observations as to the interests of society in such matters, at page 1060:

"To deprive the District Attorney or the State of Louisiana of the right to seize evidence pursuant to a search warrant issued on the basis of probable cause, and to preserve that evidence intact for use during future criminal proceedings, would be to effectively deny the state the right in a case such as this to prosecute at all under a statute already declared to be constitutional . . . ."

purchase a copy of the film to be used in evidence. Even were this possible, it would be an almost insurmountable task to prove at the trial that the purchased copy is identical to the one which is named as being the instrumentality of the crime.

If this Court were to make an exception and, where motion picture films are concerned, limit the right of law enforcement to seize the instrumentality of the crime at the time of the arrest, it would be opening another Pandora's Box and inviting another long line of litigation similar to the last 4 years involving the adversary hearing, which followed Lee Arts Theatre, Inc. v. Virginia, 392 U.S. 636.

---

and at page 1061:

> "The State could not purchase a copy of the film to be used as evidence as it could in the case of most printed publications. It is absolutely necessary for the State to have a copy of the film in order to properly enforce the statute involved. How else but by seizure could it obtain this indispensable evidence? . . . . It would make no difference insofar as First Amendment rights are concerned whether the possession of such evidence is obtained by the State by virtue of a seizure made pursuant to a search warrant properly issued or by virtue of a court order directing the defendant to deliver the film to the State so that it might be used in preparation for trial. In either case the purpose of the possession of the film by the State is to preserve the minimum amount of evidence required to properly prepare the State's case rather than to prohibit the further dissemination of the information contained in the film prior to trial."

In discharging its duty to "preserve" evidence, law enforcement rarely finds itself faced with identical fact situations.[38] If this Court fashions a new

---

38. In discharging its duty to "preserve evidence, law enforcement often finds itself faced with fact situations which are "just a little different." In California v. DeRenzy, 79 Cal. Rptr. 777, 781 (Aug. 1, 1969), hearing denied by the California Supreme Court on Sept. 24, 1969, Justice Elkington of the Court of Appeal, First District, Div, 1, pointed out some of the unusual problems which have no ready answers, but which will be affected by this Court's ruling herein:

> "De Renzy's argument in the Superior Court, not emphasized here, that the police nevertheless conducted a mass seizure since they took both nonobscene and obscene material on the same reels, is obviously without merit. Any police attempt, at the place of seizure, to edit and cut hundreds, perhaps thousands, of feet of film without expertise or proper equipment, would be a far greater threat to constitutional and property rights, than was the conduct complained of here . . . . DeRenzy has mentioned, without particularly advocating, the sometimes suggestion that in the absence of an adversary hearing, a magistrate should at least view allegedly obscene film before authorizing a search warrant. No way has yet been pointed out how this is to be accomplished. Must the magistrate at the beck of a policeman travel to the place of exhibition? If so, should the visit be clandestine or open? The former would be unfitting; a judge should not assume the role of an undercover investigator. If the magistrate makes his presence known, what reasonable assurance exists that the exhibitor will show the film, thus perhaps aiding in his own conviction. No means appear by which he may be compelled to bring his film to the magistrate. And even if such a viewing could be arranged before seizure of the film, there would still be no prior adversary

rule, it must then be prepared to sit in judgment on the refinements to the new rule.

The "chilling effect" so easily claimed by defense counsel, is more often than not, imaginary. To honor such arguments in a challenge to

---

hearing as demanded here by DeRenzy, and required, in proper cases, by Books, Marcus and Metzger. (Their Italics.)

In upholding the seizure of two films taken under an ex parte search warrant in New York v. Steinberg, 304 N.Y.S.2d 858 (Oct. 2, 1969), Judge Pollack made the following observations on the problems which attend the marshalling of evidence in motion picture obscenity cases in New York City:

> "The state is entitled to prosecute people who exhibit motion pictures which are obscene. In order to prosecute for obscenity they must first seize the films since the best evidence of whether the picture is obscene or not is the picture itself.
>
> "Before the films were seized, Judge Burchell and Judge Wein, at the request of the District Attorney, viewed all the films and trailers at regularly scheduled performances in the Capitol Theatre and then signed the search warrants . . . .
>
> "This is not a massive seizure of books, but a seizure of motion pictures. In the Court's opinion it is less practicable to hold a preliminary judicial adversary proceeding in a case involving motion pictures than in a case involving books. To require a full adversary judicial proceeding prior to the seizure would be unreasonable, and in many cases impractical since by the time a hearing could be arranged after due notice to the potential defendant the film might no longer be in the possession of the potential defendant."

the public interest which entrusts a peace officer with the right to take immediate possession of the instrumentalities of alleged crimes, when it is clear that no supportive facts exist therefor, undermines the operations of the criminal law.[39]

---

39. In U.S. v. Pryba, Herman L. Womack, Potomac News Co., 312 F. Supp. 466, 468 (Dist. of Columbia) (Apr. 2, 1970), Federal District Judge Pratt, in evaluating such defense tactics where an affidavit alleged "the films depict a man and a female engaged in sexual intercourse, and various sexual activities by males and males, and males and females," made the following comments:

> "Additionally, none of the cases cited by defendants address themselves to the impracticality, not to say impossibility, of holding a prior adversary hearing in the situation at bar where obscene materials surreptitiously placed in the stream of interstate commerce are fortuitously discovered by a civilian employee. In such circumstances, officers, after the parcel has been repacked, sent on its way; and traced to its destination, should not be required to make the futile gesture of requesting that copies be made available for viewing by a judicial officer prior to the institution of criminal proceedings. That a defendant would cooperate voluntarily is unlikely particularly in a case where hard-core obscenity is involved. Moreover, to believe that the same films would be proffered to the court in the same condition as when first viewed by the employee is to blink reality. To require the prosecution to institute civil proceedings or to issue a subpoena duces tecum would be equally impractical and would render the enforcement of 18 U.S.C. § 1462 virtually impossible. Defendants have suggested no practical method whereby a prior adversary hearing in the instant case could have been achieved.
>
> "Finally, the minimal public depriva-

(b) Autoptical Evidence (the Motion Picture Projection Print) Is To Be Favored Over Testimonial Evidence of Peace Officers As To What They Saw or Heard Exhibited On The Motion Picture Screen.

Defense Counsel Harris was quick to object that the motion picture projection print was the "Best Evidence," which prevented Sheriff Phelps from giving testimonial evidence as to what he saw and heard at the Drive-In (Statement of the Case, supra, at page 14). The rationale behind the "Best Evidence" rule is stated in Model Code of Evidence, American Law Institute, Rule 602. Comment at page 300 to be: (see also McCormick on Evi-

---

> tion and any chilling effect on the exercise by defendants of constitutionally protected rights were diminished by the Government's proffer of an adversary hearing on the issue of obscenity attempted to be held only five days after the seizure. Had these materials been non-obscene, such a determination could have been promptly made following the seizures and the materials returned to defendants for such public or private display as they desired. Defendants waived the opportunity to participate in this hearing, however, and with it gave up the opportunity immediately to require the prosecution to demonstrate that these materials were obscene and therefore unfit for public consumption. The apparent nature of the films involved supplies convincing reasons for the defendants' disinterest in having such a hearing.
>
> "In short, we hold that an adversary hearing on the issue of obscenity prior to seizure was not required under the facts of this case."

dence (1954) at page 410; 4 Wigmore on Evidence (3rd Edition, 1940, Section 1179):

> "Slight differences in written words or other symbols may make vast differences in meaning; there is great danger of inaccurate observation of such symbols, especially if they are substantially similar to the eye. Consequently there is opportunity for fraud and likelihood of mistake in proof of the content of a writing unless the writing itself is produced. Hence it should be produced if available."

If the trial judge's ruling that, "I am going to permit him to tell what the film was about as a general proposition, but not to go into full details, because if the picture is exhibited to the jury, they can see the film themselves . . . ." was based upon the "best evidence" objection, then the rationale acknowledged by this Court as the basis for its permitting blood samples to be taken in drunk driving cases has similar application here, where the Kentucky Court, in developing workable rules governing arrests and seizures based on the principles of reasonableness under the circumstances of the case, Ker v. California, supra, saw fit to favor autoptical evidence over the testi-

monial evidence of Sheriff Phelps as to what he heard and saw.

At least one other jurisdiction has specifically ruled that motion picture films constitute "writings" which, under the California Evidence code, require their production at the trial under the "Best Evidence" rule. In California v. Enskat, 98 Cal. Rptr. 646, 647, 20 Cal. App.3d. Supp. 1 (Sept. 21, 1971) the Appellate Department ruled that a proper foundation must be laid before secondary evidence would be admitted.[40] In Califor-

---

40. In Enskat, the Appellate Department held as follows:

> "That there appears to be a 'motion picture' does not alter the fact that a series of single pictures on the film strip, each one a 'writing' is casting an image on the screen.
>
> "Respondent argues, however, that it is not the film, but these light images on the screen, that constitute the offense of exhibiting an obscene motion picture. Respondent argues that as this moving image is unrecorded, it cannot be a writing, and therefore is not subject to the best evidence rule. This argument ignores the essential fact that the moving image is merely the consequence of casting a writing (the film) through a machine. Without the projector and the filmstrip, no moving image is cast at all. The contents of the moving image, 'evanescent' or not, is totally dependent upon the content of the filmstrip. Just as it is better for the trier of fact to read a document than have it described, it is better for the trier of fact to see a movie than have it described. The policy considerations upholding the rule for written documents apply with full force to movies as well . . . ."

nia v. Goulet, 98 Cal. Rptr. 782, 783, 21 Cal. App. 3d. Supp. 1 (Dec. 7, 1971), that same Court recognized, in applying the best evidence rule in a motion picture obscenity case that, in some cases, secondary evidence may be insufficient on its face and require its rejection.[41]

The indispensable nature of such autoptical evidence, being the very instrumentality of the

---

41. In Goulet, the Appellate Department ruled:

> "We return to the major ground of dismissal, that the film in question must be available as evidence, and that verbal description of the contents (or 'secondary evidence') is not admissible. Although this appears to be a case of first impression in this state in the obscenity area, the use of secondary evidence in criminal cases generally has long been recognized (People v. Rial (1914), 23 Cal. App. 713, 139 P. 661; People v. Chapman (1921), 55Cal. App. 192, 203 P. 126; People v. Powell (1925) 71 Cal. App. 500, 236 P. 311). Such case is also expressly recognized in new Evidence Code (Section 1503) subsection (a).
>
> "To be sure, there may be cases where it is difficult to establish the contents of a film or book by oral secondary showings, particularly where its obscenity may be borderline in character. There may also be cases where the secondary showing may be insufficient on its face and require a court to reject it in its entirety. But we do not reach issues as to the sufficiency of the secondary evidence offered, the sufficiency of the foundation laid for its admission, or the extent to which any common law basis for the use of secondary evidence has been expanded or contracted by the Evidence Code . . . ."

crime, is obvious. In a number of cases it has been shown that, unless such evidence is preserved, the prosecution may fail. See Bryers v. Texas, 480 S.W. 2d 712 (May 31, 1972) where the Court reversed an obscenity conviction based upon testimonial evidence only, saing at 718:

> "In conclusion we hold that the evidence is insufficient to sustain an obscenity conviction unless (1) the alleged obscene matter, in this case a film, is introduced into evidence, or (2) the defendant expressly and affirmatively stipulates or admits that the material is obscene under the standards stated in Article 527, Section (A)."

In Longoria v. Texas, 479 S.W.2d 689 (Feb. 16, 1972) a jury assessed a fine of $1,000.00 and six months in jail for exhibiting four films in Corpus Christi, Texas. At the trial two police officers described several scenes from the films, which showed nude bodies of men and women, acts of sexual intercourse, acts of oral sodomy, other sexual activity and a limited amount of conversation. Neither the films nor any portions or representations of them were introduced into evidence. The Court of Criminal Appeals of Texas reversed on the grounds that the testimony of the officers describ-

ing the motion pictures was insufficient evidence for the jury, or the Appellate Court, independently, to determine obscenity. In Longoria v. Texas, the Court noted that in Brown v. State of Texas, 167 Tex. C.R. 351, 320 S.W.2d 670, a verdict by a jury which had seen the film was reversed on appeal where the record contained nothing to show what the jury saw and what the evidence was.

Amicus submits that to prohibit the seizure of autoptical evidence at the time of the arrest would be contrary to general principles of the law which prefer its use - more so, when such is also the very instrumentality of the crime. To do so would impede the marshalling of the most trustworthy, if not indispensable evidence, and would generally frustrate criminal prosecutions.[42] In this regard Federal District Judge Nixon, writing for the majority in Hosey v. City of Jackson,

---

42. Suppose a case in which reliable information establishes that an adult male has exhibited "photographs and books (entitled 'Guidebook To Sexual Positions Between Consenting Adult Males by J. J. Proferes') with pictures of nude men performing sodomy and unnatural and perverted sex acts" to a 13-year old boy, immediately after which he performed an act of oral sodomy on the 13-year old, would the police be authorized to seize the book as evidence of the crime, either under a search warrant or incident to his arrest at his home, or would they first have to afford him an adversary hearing? See Hughes v. Maryland, 287 A.2d 299, 308 (Feb. 16, 1972). If not there, why then here? See footnote 29, supra, at page 60.

309 F. Supp. 527 at 534, footnote 9 (Jan. 22, 1970), vacated and remanded on jurisdiction in 401 U.S. 987, 28 L.Ed.2d 525, 91 S.Ct. 1221, noted as follows:

> "The right and even the duty of police officers to seize the evidence which was the very means or vehicle of the commission of a crime committed in the officer's presence is not, in this court's opinion, affected by the holding in Chimel. To prohibit the seizure of such evidence under these circumstances would completely frustrate criminal prosecution, and necessarily the arrest for a crime witnessed by the arresting officers . . . ."

(2) The Seizure Incident To The Arrest Was Within The Reach Authorized by CHIMEL v CALIFORNIA.

Searches incident to lawful arrest are justified notwithstanding the absence of a search warrant in order to prevent the alteration or destruction of evidence of the crime. In Preston v. U.S., 376 U.S. 364, 367, 11 L.Ed.2d 777, 780, 84 S.Ct. 881 (Feb. 25, 1954) this Court noted:

> "The rule allowing contemporaneous searches is justified, for example, by the need to seize weapons and other

> things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime - things which might easily happen where the weapon or evidence is on the accused person or under his immediate control." (Our emphasis.)

See also Chimel v. Calif., 395 U.S. 752, 23 L.Ed. 2d 685, 89 S.Ct. 2034 (June 23, 1969), where this Court said at page 694:

> "When an arrest is made . . . it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab . . . evidentiary items must, of course, be governed by a like rule . . . . There is ample justification, therefore, for a search of the arrestee's person and the area within his immediate control - construing that phrase to mean the area from within which he might gain possession of . . . destructible evidence . . . " (Our emphasis.)

It is clear that the warrantless search of the projection booth incident to Petitioner's arrest was within the reach authorized by Chimel v. California, supra. Petitioner was in the booth from which the audio and visual projections originated, and at the time he was arrested was himself in possession of the motion picture film which was seized.

Further, it is not a "search" where an officer observes contraband which is clearly visible from a place where an officer has a right to be. Nichols v. Commonwealth of Kentucky, 408 S.W.2d 189. A search warrant is not necessary, where the object sought by search is visible, open and obvious to anyone within reasonable distance, employing his eyes. Ferrell v. Comm. of Ky., 264 S. W. 1078, 264 Ky. 548, or where the objects sought are visible, open and obvious to anyone, who even casually looks around. Foster v. Commonwealth of Kentucky, 415 S.W.2d 373, cert. den. 388 U.S. 914, 18 L.Ed.2d 1355, 87 S. Ct. 2128.

Granted the law's preference for search warrants, a state is not required to resolve all such issues on the practicability of obtaining a search warrant. The Commonwealth of Kentucky was entitled to rely on this Court's express invitation to develop workable rules, governing arrests

and searches, based on the principle of reasonableness under all the circumstances of the case. Ker v. Calif., 374 U.S. 23, 33-34, 10 L.Ed.2d 726, 83 S.Ct. 1623.

There is nothing inherently wrong with a state policy which authorizes a peace officer to make a warrantless arrest for obscenity so long as the procedural law permits a person so arrested to contest the "probable cause" determination either in an ancillary proceeding in the criminal prosecution or in a separate civil action. See footnotes 7 and 22, supra; U.S. v. 37 Photographs, 402 U.S. 363, 28 L.Ed.2d 822, 91 S.Ct. 1400 (May 3, 1971)[43]; Johnson v. Commonwealth of Kentucky,

---

43. Twenty days elapsed between the time that Sheriff Phelps arrested the Petitioner and seized the film "Cindy and Donna" as the instrumentality of the crime and the return of the special verdicts of the jury that the film was obscene and that Petitioner had knowledge of the obscenity thereof when he exhibited the same. Such restraint as occurred here was clearly within the guidelines set down by this Court in U.S. v. 37 Photographs, supra, at 832:

> "Given this record, it seems clear that no undue hardship will be imposed upon the Government and the lower federal courts by requiring that forfeiture proceedings be commenced within 14 days and completed within 60 days of their commencement; nor does a delay of as much as 74 days seem undue for importers engaged in the lengthy process of bringing goods into this country from abroad. Accordingly, we construe § 1305(a) to require intervals of no more than 14 days from seizure of the goods to

475 S.W.2d 893, 894 (Dec. 17, 1971). See also the dissent of Justice White in Chimel v. Calif., 395 U.S. 752, 782-783, 23 L.Ed.2d 685, 89 S.Ct. 2034, 2051-2052, wherein he noted that, "In considering searches incident to arrest, it must be remembered there will be immediate opportunity to challenge the probable cause for the search in an adversary proceeding. The suspect has been apprised of the search . . . and having been arrested, he will soon be brought into contact with people who can explain his rights . . . . An arrested man, by definition conscious of the police interest in him, and provided almost immediately with a lawyer and a judge, is in an excellent position to dispute the reasonableness of his arrest and contemporaneous search

---

the institution of judicial proceedings for their forfeiture and no longer than 60 days from the filing of the action to final decision in the district court . . . .

"Of course, we do not now decide that these are the only constitutionally permissible time limits. We note, furthermore, that constitutionally permissible limits may vary in different contexts; in other contexts, such as a claim by a state censor that a movie is obscene, the Constitution may impose different requirements with respect to the time between the making of the claim and the institution of judicial proceedings or between their commencement and completion than in the context of a claim of obscenity made by customs officials at the border. We decide none of these questions today." (Our emphasis.)

in a full adversary proceeding.[44] " Justice Stewart's response to Justice White in Chimel at footnote 7 that, "one may initially question whether all of the states in fact provide the speedy suppression procedures the dissent assumes . . . ." provides no satisfactory answer for those states that do. This Court should bear in mind the very real interest the State of Kentucky and other states have in suppressing obscenity and maintaining high moral standards. On the strong legislative policy of the Commonwealth of Kentucky against obscenity, see Point I A 1, supra.

---

44. Consider the procedure adopted in North Carolina. North Carolina v. Bryant, 183 S.E.2d 824 (Oct. 20, 1971). On May 17, 1971, an arrest was made on Joe Bryant and others under an arrest warrant charging the sale of named books and magazines. In executing the arrest, certain materials were seized. The State immediately moved for an adversary hearing which was set for May 24, but continued to May 25th at the defendant's request. After the hearing the trial judge held the seizure incident to the arrest to be proper and ordered certain materials to be retained and others to be returned. On appeal, the Court of Appeals of North Carolina ruled that the trial judge's decision was in the nature of an interlocutory order which could not be appealed until after a final determination of the whole case.

C. Petitioner Was Not Deprived of Due Process When The Positive Film Print Was Admitted Into Evidence at The Trial.

Petitioner's motion to suppress the evidence, based upon Fourth Amendment principles, was properly denied. Further, by waiving a pretrial motion to restore the film print and conceding the obscenity of the film, Petitioner is now foreclosed from arguing First Amendment principles.

It is clear from the foregoing principles and authorities that the public policy requires that the positive film print which was used to project the images and sound, being the instrumentality of the alleged crime, be preserved intact and introduced as evidence for the consideration of the trier of fact in its determination on the issue of guilt or innocence. Whether as "best evidence" or as "indispensable evidence" the search for objective truth requires that law enforcement investigators ferret out and preserve the same so that the law may be honestly administered. In Elements of Police Science, copyright 1942, Foundation Press, Inc., Professor Rollin Perkins comments on the duties and responsibility of law enforcement investigators in such matters, at pages 44 and 50:

"It is impossible to give all of the

rules for conducting every variety of investigation which the police are called upon to make, but there are some rules which have general application. They are . . . 21. A search must be made for all clues to aid in establishing the fact that a crime has or has not been committed, as well as for evidence which will not only prove useful in identifying and convicting the perpretrator, but also aid in eliminating innocent suspects . . . 25. During the progress of the general survey, everything must be observed with maximum attention. A Chinese saying, 'The eyes see only what they look for, and look for what is already in the mind,' is particularly applicable in the field of investigation. . . 26. . . . In an important case recently tried, the omission of these details and the non-observance of important evidence almost resulted in the execution of an innocent person. . . 36. All movable evidence must be carefully wrapped or placed in suitable containers, sealed, and marked with the identification symbol with the following notations thereon: The

place from whence taken, the date and time, the names of witnesses to the act, the name or number of the report, and the name of the person who removed the evidence . . . 37. Every article taken must be handled and packed so that all characteristics will be preserved from the moment of collection until presented to the expert for examination or introduced by the investigator at the trial. All evidence must when presented in court show a complete chain of its custody from the time it was first taken into possession until presented as evidence. The courts have continuously held that evidence must be identified with the place of discovery, that it be uncontaminated, and unchanged in character. . . ."

(Our emphasis.)

The Commonwealth fully complied with all of the requirements of the law. During its case in chief, the Commonwealth attorney offered in evidence the positive film print which was seized and showed a complete chain of its custody from the time it was first taken into the possession of Sheriff Phelps at the time of the arrest until received in evidence as Exhibits 1 - 5 (see

Statement of the Case, supra, at Page 15).

This Court should take particular note of what occurred thereafter. The jury and Sheriff Phelps travelled to a remote spot where they viewed the film, after which they returned to the courtroom where Sheriff Phelps testified that he recognized the film which was shown to the jury as the same one he has seen at the Highway 27 Drive-In Theatre on Sept. 29, 1970. He failed, however, to connect up the evidence and account for the positive film print from the time it was received as evidence in the courtroom until it was shown to the jury at the remote spot. Upon questioning by the Court on its own motion, the record was made clear that the positive film print which was used to project the images and sound for the jury was the identical film print which was seized from Petitioner on the night of the alleged offense and, that therefore, the jury could accept the autoptical evidence which had been introduced, and need not rely upon the testimonial evidence of Sheriff Phelps which drew a comparison between what he had seen with the jury and what he had seen at the Drive-In on the night of September 29, 1970.

II

THE PAST DECISIONS OF THIS COURT DO NOT SUPPORT PETITIONER'S CLAIM THAT THE DENIAL OF AN ADVERSARY HEARING PRIOR TO SEIZURE AMOUNTS TO A VIOLATION OF DUE PROCESS OF LAW.

Until this Court's per curiam reversals in May and June of 1967,[45] the defense attorneys had never, in their wildest imagination, dreamt up enough courage to advance the arguments now made herein - i.e., that the failure to have an adversary hearing on the issue of the obscenity of a

---

45. On May 8, 1967, two obscenity convictions and one injunction were reversed: Redrup v. New York, 386 U.S. 767; Austin v. Ky, 386 U.S. 767; Gent v. Arkansas, 386 U.S. 767 (Inj.). On June 12, 1967, seventeen obscenity convictions and two injunctions were reversed: Keney v. N.Y., 388 U.S. 440; Friedman v. N.Y., 388 U.S. 441; Sheperd, Lewis and Bloomberg v. N.Y., 388 U.S. 444; Avansino, Sessa, Strombelline, Gaggi and Costanza v. N.Y., 388 U.S. 446; Cobert v. N.Y., 388 U.S. 443; Ratner v. Calif., 388 U.S. 442; Schackman v. California, 388 U.S. 454; A Quantity of Books v. Kansas, 388 U.S. 452 (Inj.); Corinth Publications, Inc. v. Wesberry, 388 U.S. 448 (Inj.); Books, Inc. v. U.S., 388 U.S. 449; Aday v. U.S., 388 U.S. 447; Rosenbloom v. Va., 388 U.S. 450; Mazes v. Ohio, 388 U.S. 453. The Court refused to render a decision on the film, "Flaming Creatures," Jacobs v. N.Y., 388 U.S. 431, and on the New York Statute imposing absolute liability where girlie magazines were sold to minors, Tannenbaum v. N.Y., 388 U.S. 439, ruling both cases moot. Only as to the film "Un Chant D'Amour" did the Court uphold an obscenity determination, and that by a 5-4 decision, Landau v. Fording, 388 U.S. 456. The Court also refused to review by habeas corpus the 30-day jail sentence of Wenzler for selling a girlie strip film, "First Fling," Wenzler v. Pitchess, 388 U.S. 912, as to which it had denied certiorari two terms earlier in Wenzler v. California, 377 U.S. 994 (June 22, 1964). Compare the Kentucky solution at Point IA1(a), supra, at page 44 .

film, prior to arrest and seizure, amounts to a denial of due process. For an example of the standard defense tactic used prior to that time, see Schackman v. Arnebergh, 258 F. Supp. 983 (Sept. 27, 1966) wherein one of the defendants in Schackman v. Calif. (see footnote 45) brought a collateral civil action in the federal district court seeking a declaratory judgment that the films involved in the state criminal prosecution (D-15, O-7, O-12) were not obscene and asking for an injunction against enforcement of the California Statute. The aura of respectability given to such materials by the 1967 reversals and this Court's summary reversal of the criminal conviction in Lee Art Theatre v. Virginia, 392 U.S.636, 20 L.Ed.2d 1313, 88 S. Ct. 2103 (June 17, 1968),[46/] was to change all this and, in opening Pandora's

---

46. The Lee Art Theatre case was decided on the last day of the 1967 October Term and without benefit of briefing on the merits or oral argument. The petition therein, Lee Art Theatre, Inc. v. Virginia, No. 977, October Term 1967, shows that the central issue was the seizure of the two films under the search warrant. The facts did not include the issue of a seizure incident to an arrest. The affidavit in support of the search warrant read, as follows (Petition for Certiorari, Appendix 2a, 3a):

"AFFIDAVIT FOR SEARCH WARRANT

"Commonwealth of Virginia,
City of Richmond, to-wit:

Box, set free a can of worms which has been plaguing law enforcement for four years.

Petitioner objects to the seizure of the

Before me, ..., a Justice of the Peace of the City aforesaid, this day appeared Charlie E. Phillips and made affidavit as follows:

"(1) Substantially the offense in relation to which search is to be made. Possessing, exhibiting and showing lewd and obscene motion pictures, To-wit: 'The Erotic Touch of Hot Skin' and previews of 'Rent-A-Girl' motion picture.

"(2) The material facts constituting probable cause for issuance of the warrant. Personal observation of the above mentioned motion picture and previews. Observation of the billboard in front of theatre.

"(3) What is to be searched for under the warrant. Lewd and obscene motion pictures and other pornographic material that is kept in said theatre.

"(4) The building to be searched. THE LEE ART THEATRE, 934 West Grace Street, Richmond, Virginia.

CHARLIE E. PHILLIPS
Affiant

"Subscribed and sworn to before me this 21st day of March 1966.

M. C. LOWRY, III
Justice of the Peace."

The very substantial difference between Lee Art Theatre and the case herein is apparent. See Whiteley v. Warden of Wyoming State Penitentiary, 401 U.S. 560, 566, 28 L.Ed.2d 306, 312, 91 S.Ct. 1031 (Mar. 29, 1971). Here there was no search - the seizure of the film whose presence was obvious to everyone being incident to the arrest, Nichols v. Ky., supra.

motion picture film "Cindy and Donna," viewing obscenity as a unique area, requiring special treatment. Such arguments are drawn out of context from language of certain members of this Court in Marcus v. Kansas City Search Warrants, 367 U.S. 717 (1961) and A Quantity of Books v. Kansas, 378 U.S. 205 (1964) and subsequent lower court decisions which, in misapplying such language, erroneously hold that a judicial determination of obscenity in an adversary proceedings is constitutionally required before a motion picture film may be seized as evidence for a criminal prosecution.

The Quantity of Books case concerned not a criminal prosecution, but an auxiliary means of attacking obscene materials - civil suppression of all copies through injunction, a form of relief given limited approval in Kingsley Book, Inc. v. Brown, 354 U.S. 436. Such injunction statutes are not always surrounded by the due process safeguards which automatically attend criminal prosecutions. Quantity of Books was, therefore, an example of a civil procedure presenting the problem (as four members of the court saw it) of unconstitutional prior restraint. In Quantity of Books, it was the civil process which was imperfect, and that decision sought only to bring the

civil procedure up to the level of the criminal process. It did not declare that the regular criminal procedures were outmoded.

The seizure of all copies as in Quantity of Books, pursuant to injunction may impinge directly on the First Amendment, whereas a seizure of a single copy, as evidence antecedent to a criminal prosecution, is cognizable under the Fourth Amendment. Civil remedies proceed directly against a publication, the sole issue being the nature of the publication; in the criminal proceedings, however, the issue is not suppression of books, but whether the defendant, by his conduct has committed a crime. Probable cause that he has committed a crime serves to bring him to trial, the seizure of publications becoming a gathering of evidence of the defendant's actions, and being purely incident to the arrest.

Misunderstandings placed upon the A Quantity of Books decision, stemming from a failure to distinguish its prior restraint civil aspects from criminal cases involving a seizure to obtain evidence for a criminal prosecution, have brought about a rash of bad law and chaos in this area of law.

Unfortunately, one of the first and best cases in this contentious area of the law went

unreported for 14 months. See East Village Other, Inc. v. Koota, finally reported in 305 F.Supp. 1159 (Feb. 13, 1968). In his opinion at page 1162, Judge Dooling correctly interpreted Marcus v. Kansas City Search Warrants, 367 U.S. 717 (1961); A Quantity of Books v. Kansas, 378 U.S. 205 (1964), and Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957), and their relationship to the lower court obscenity decisions of Potwora v. Dillon (CA2), 386 F.2d 74 (Nov. 14, 1967), and Evergreen Review, Inc. v. Cahn (EDNY 1964), 230 F. Supp. 498, which were the leading federal cases on mass seizures at the time of Judge Dooling's decision.

The subsequent decisions were to lose themselves in the confusion flowing from the language in the Marcus and A Quantity of Books cases. The reasoning which led to the illogical results reached in Metzger v. Pearcy, 393 F.2d 202 (7th Cir. 1968), Cambist Films, Inc. v. Illinois, 292 F.Supp. 185 (No.Dist.Ill. 1968); Cambist Films, Inc. v. Tribell, 293 F. Supp. 407 (E.Dist.Ky. 1968); Tyrone, Inc. v. Wilkinson, 410 F.2d 639 (4th Cir. 1969), and Bethview Amusement Corp. v. Cahn, 416 F.2d 410 (2d Cir. 1969) failed to take into account the limited previous restraint condition which had been

generally accepted in the federal custom cases and was finally upheld in U.S. v. 37 Photographs, 402 U.S. 363 (1971).[47] See e.g., U.S. v. 56 Cartons of Magazines Entitled Hellenic Sun, 373 F.2d 635 (4th Cir. 1967); U.S. v. A Motion Picture Film Entitled "491", 367 F.2d 889 (2d Cir. 1966); U.S. v. One Book Entitled "The Adventures of Father Silas", 249 F.Supp. 911 (SDNY 1966); and U.S. v. A Motion Picture Film Entitled "Pattern of Evil", 304 F.Supp. 197, 199 (Sept. 2, 1969). Contra, U.S. v. 18 Packages of Magazines, 238 F.Supp. 846 (N.D.Cal. 1964). See also the discussion of these cases on this point in U.S. v. Brown, 274 F.Supp. 561, 565 (Oct. 18, 1967), where the Court said:

"Although the government does not urge

---

47. This Court should take judicial notice of the fact that these has never been a serious claim to a right to exhibit a film while the same was being timely pursued in the federal courts on an "obscene libel" charge. Compare U.S. v. Unicorn Enterprises, Inc., 403 U.S. 925, 29 L.Ed.2d 704, 91 S.Ct. 2241 (June 15, 1971) (Language of Love). If not in the federal jurisdiction, why should there be a different rule in state cases -- particularly here, where the "prompt judicial decision by the trial court" was reached 20 days after the arrest and seizure? Teitel Film Corp. v. Cusack, 390 U.S. 139, 142, 19 L.Ed.2d 966, 969, 88 S.Ct. 754 (1968); Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 690, n.2, 20 L.Ed. 2d 225, 235, 88 S.Ct. 1298 (1968). Compare the procedure followed by Suffolk County District Attorney Byrne, commented on in the dissenting opinion of Justices Brennan, White and Marshall in Byrne v. Karalexis, 401 U.S. 216, 220, 27 L.Ed. 2d 792, 796, 91 S.Ct. 777 (Feb. 23, 1971).

their application here, something should be said about the recent spate of cases involving the constitutionality of Section 305 of the Tariff Act of 1930, 46 Stat. 688, as amended, 19 USC Section 1305 (1964) which permits customs officials to hold and inspect allegedly obscene imports to determine whether forfeiture proceedings should be instituted." (Our emphasis.)

It was unfortunate that the first major decision in this area was a criminal prosecution which had some of the aspects of the mass seizure, civil process, prior restraint cases. In Metzger v. Pearcy, 393 F.2d 202, the Marion County Prosecutor on Oct. 25, 1967, made arrests at three outdoor movie theaters where the film, "I A Woman" was shown, and seized the prints being used by the three exhibitors. A fourth arrest was made by the Indianapolis police department on Nov. 2, 1967, in connection with its showing at an outdoor theater in that city, where that print also was seized. All four seizures were by police officers without arrest or search warrants, incident to an arrest for a misdemeanor committed in their presence. Six months later, when the Court of Appeals ruled on the matter, the criminal cases

had not yet come to trial.

In Metzger v. Pearcy, supra, the Circuit Court of Appeals for the Seventh Circuit, held that an adversary hearing was necessary before the motion picture film could be seized incident to an arrest for a misdemeanor committed in the officer's presence. The court ordered the film returned, but at the same time required that the exhibitor make it available to the County Prosecutor for the trial of the criminal prosecution - a somewhat inconsistent result. The Marion County Prosecutor announced that he was unable to prosecute the criminal case because of the break in the chain of evidence. It is submitted that the fundamental error of Metzger v. Pearcy appears at page 204, where the court stated:

> "The lessons of Books is that law enforcement officers cannot seize allegedly obscene publications without a prior adversary proceeding on the issue of obscenity. Such a seizure violates the First Amendment of the Constitution of the United States, and in a prior restraint condemned by the Supreme Court . . . ."

The court was thinking of the four prints which were seized in Metzger v. Pearcy and (very like-

ly) the delay in trying the criminal case, and equated the multiple seizure in that case to the multiple seizure in A Quantity of Books, without further analysis, i.e., inquiring whether the state procedures in such criminal cases, as here, authorized a speedy adversay hearing immediately after the seizure to permit the cognizable court to focus searchingly on the obscenity issue. Compare the California rule which authorizes just such a procedure in Holden v. Arnebergh, 71 Cal. Rptr. 401 (Aug. 21, 1968); appeal dismissed in Holden v. Arnebergh, 22 L.Ed.2d 112 (Mar. 3, 1969), and the speedy Kentucky procedure herein.

Thereafter, the Fourth Circuit Court of Appeals, relying on Metzger v. Pearcy and its faulty rationale, extended the Quantity of Books result as far as to say that a search warrant may not issue to seize a film as obscene, even when the issuing judge has himself taken the trouble to view the subject matter prior to his issuance of the search warrant. Tyrone, Inc. v. Wilkinson, supra. In the Second Circuit, Federal District Judge Pollack of the U. S. District Court for the Southern District of New York, however, held to the contrary on almost identical facts. 208 Cinema, Inc. v. Vergari, 298 F.Supp. 1175 at 1177 (May 5, 1969); Rage Books, Inc. v. Leary,

301 F. Supp. 546, 549 (July 1, 1969).

In Delta Book Distributors, Inc. v. Cronvich, 304 F.Supp. 662 (July 14,1969) (E.D.La., New Orleans Div.) reversed on other grounds in Perez v. Ledesma, 401 U.S. 82 (Feb. 23, 1971), Justice Boyle in a 2-to-1 decision, with Justice Rubin dissenting, wrote an opinion that went the Pearcy decision one better - that court indicated an adversary hearing was necessary even as to material which had been purchased by the People. The court footnoted that statement with the remarkable observation:

> "Of course, the defendants cannot be ordered to return the purchased materials, as in the instance of those seized, since title thereto had passed."

In his dissent, Justice Rubin voiced a more rational solution, at page 673:

> "In considering searches incident to arrest, it must be remembered, Justice White said in his dissent in Chimel v. California, 1969, 395 U.S. 752, 782-783, 89 S.Ct. 2034, 2050-2051, 23 L.Ed.2d 685, 'that there will be immediate opportunity to challenge the probable cause for the search in an adversary proceeding. The suspect has been ap-

prised of the search . . . and having been arrested, he will soon be brought into contact with people who can explain his rights . . . . An arrested man, by definition conscious of the police interest in him, and provided almost immediately with a lawyer and a judge, is in an excellent position to dispute the reasonableness of his arrest and contemporaneous search in a full adversary proceeding.'

"That in my view is all that the state is required to do. It is no longer an acceptable proposition in tort law that a dog is entitled to one free bite, there should be no rule in criminal law -- even by virtue of the protection accorded to freedom of speech -- that every peddler of pornography is entitled to one free assay at scatology.

"Never has the Supreme Court intimated such a requirement. It gave no hint of it when, without exacting any adversary hearing prior to prosecution, it upheld the conviction of a defendant under a New York statute for a sale of

> obscene materials to minors, in Ginsberg v. New York, 1968, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195, or when it upheld another conviction under the New York statute for 'hiring others to prepare obscene books, publishing obscene books, and possessing obscene books with intent to sell them.' Mishkin v. New York, 1966, 383 U.S. 502, 86 S.Ct. 958, 16 L.Ed.2d 56. It is obviously impossible to hold a 'prior adversary hearing' with respect to the offense of hiring someone to prepare an obscene book and difficult to conceive that it would be practical to hold one for the offense of publishing them. Nor is the rule this Court now adopts consonant with the conviction affirmed in Ginzburg v. United States, 1966, 383 U.S. 462, 86 S.Ct. 942, 16 L.Ed. 2d 31, under an indictment charging violation of the federal obscenity statute."

See also, the excellent opinion of Federal District Court Judge Frankel, speaking for a three judge court in Milky Way Productions v. Leary, 305 F. Supp. 289, 295-297 (Oct. 15, 1967), af-

firmed on the merits in New York Feed Co. v. Leary, 397 U.S. 98, 25 L.Ed.2d 78, 90 S.Ct.817 (Feb. 27, 1970).

There is a plethora of conflicting decisions at the present time following one or more of the above authorities, some of which have resulted in open confrontation between state and federal courts of the order which resulted in the enactment of 28 U.S.C. Sections 2281 and 2284. See also footnotes 2 and 3 herein. One comes away from a study of these cases with the conclusion that the results obtained depend not on established principles of law but rather upon the personal philosophy of the members of the court writing the opinion. Nowhere is it more apparent than in the study in contrast of the opinions of the District Court of Appeal upholding a seizure of the film "Sexus" without a search warrant in Flack v. Anaheim Judicial District, 56 Cal. Rptr. 162 (Feb. 3, 1967), and the California Supreme Court overruling that decision in Flack v. Anaheim Municipal Court, 59 Cal. Rptr. (July 26, 1967). The former opinion recites the traditional role of the police officer in making arrests on probable cause, at page 165:

> "It is settled law that an officer has the right and duty to arrest without a

warrant for a misdemeanor committed in his presence; and to seize property by means of which the crime was committed. (Citation.) Here, the theater where the arrest and seizure were made was open to public patronage. The arresting officers had the right to enter along with other members of the public. The film in question, which was shown on the screen to the patrons assembled, was deemed by the viewing officers to be contraband, whereupon they arrested appellant and seized the film as an incident to the arrest. No citation of authority seems necessary for the proposition that probable cause need not be previously determined in each instance by a judicial officer before a police officer can make the lawful arrest accompanied by seizure for that which would appear to 'the reasonable man' to be a crime involving contraband. Police officers cannot be relegated to a classification wherein their judgment would not meet the test enunciated in Roth v. U.S., ..."

The California Supreme Court reversed, enunciat-

ing a new policy and different rule.[48/]

Amicus submits that a state is not required to follow the California procedural rule and create exceptions to the traditional right of a police officer to seize evidence incident to an arrest. See Point IA4, supra, at page 49. If the state judiciary prefers to test the officer's judgment after arrest, by providing for an immediate adversary hearing procedure after arrest, there can be no serious claim of a constitutional infringement. If for no other reason than

---

48. For the past 10 years, the obscenity decisions of the California Supreme Court have been dominated by the liberal thinking of several of its justices. See, for example, Justice Tobriner speaking in Zeitlin v. Arnebergh, 59 Cal.2d 901, 31 Cal.Rptr. 800, 383 P.2d 152 (July 2, 1963) and In Re Giannini, 69 Cal.2d 563, 72 Cal. Rptr. 655, 446 P.2d 535 (Nov. 14, 1968); Justice Mosk speaking in Barrows v. Municipal Court, 1 Cal. 3d 821, 83 Cal.Rptr. 819, 464 P.2d 483 (Jan. 30, 1970), and the dissenting opinions of Justices Tobriner, Peters and Mosk in People v. Luros, 4 Cal.3d 84 at 93, 92 Cal. Rptr. 833 at 839, 480 P.2d 633 (Feb. 18, 1971); Dixon et al. v. Municipal Court of City and County of San Francisco, 267 Cal. App.2d 875 73 Cal. Rptr. 587, 590 (Jan. 29, 1969), and Landau v. Fording, 245 Cal. App.2d 872, 54 Cal. Rptr. 177 (Oct. 24, 1966), the last of which was affirmed on the merits by this Court in Landau v. Fording, 288 U.S. 456, 18 L.Ed.2d 1317, 87 S.Ct.2d 109 (June 12, 1967). The Flack rule, decided in July of 1967, was a product of that liberal influence and a forerunner to the claim herein that there must be an adversary hearing before arrest and seizure. The absence of any discussion in Flack regarding the latter controversy is evidence of the recent origin and newness of such claims.

practicality and necessity, such procedures must prevail. See Holden v. Arnebergh, 71 Cal. Rptr. 401 (Aug. 21, 1968) where an attack was made on the Los Angeles City Attorney's law enforcement methods and California procedure which permits an officer to arrest and seize material incident to an arrest but requires an immediate adversary hearing after the arrest on the issue of probable cause, if the arrested party so desires. In his motion to dismiss the Holden appeal in the United States Supreme Court the City Attorney asked the following practical questions of this Court:

> 1. Will the task of reviewing each of the hundreds of items now reviewed by the prosecuting attorneys and their staff, be so burdensome to the courts, considering the crowded condition of their calendars, that they will be unable to act and to do so will in effect be an abdication of responsibility owed to the public at large to control the spread of pornography?
>
> 2. Can the courts afford to provide the time and the judicial personnel necessary to review the vast amount of trash publications that comprise much of the questionable material . . . ?

3. Will the court's preemption of the task now assigned by statutory law to prosecuting attorneys in deciding what is or is not obscene, add anything to true freedom of speech and press or will it result in more inability to agree as has been demonstrated by the decisions in Redrup v. N.Y. . . .?

4. There is no constitutional requirement of judicial filtering of police judgment on probable obscenity prior to lawful arrest and seizure of allegedly obscene materials when the volume and quantity of such materials renders prior judicial scrutiny a barrier to public protection. . . ."

The City Attorney's motion to dismiss was granted. See Holden v. Arnebergh, 22 L.Ed.2d 112 (Mar. 3, 1969).

Conclusion.

In Roth-Alberts, this Court observed that it was the universal judgment of civilized nations that obscenity should be restrained. This presumption regarding the nature of the public evil amply supports the Kentucky Court of Appeals ruling which refused to except the obscenity crime

from the Legislature's grant of authority to a peace officer to make an arrest for a misdemeanor committed in his presence.

To prevail in a warrantless arrest three conditions must exist: (1) A valid law; (2) statutory authority for the arrest, and (3) probable cause for the arrest. There can be no question as to the first two requirements having been met and the Petitioner, by conceding factual obscenity, is precluded from denying that probable cause existed.

The factual issue of "probable cause" in obscenity cases depends on several factors, primarily: (1) The nature of the film and (2) the capacity of peace officers to evaluate obscenity in light of the Roth standards. Petitioner, having conceded the former, that issue is not before this Court. As to the latter matter, the Kentucky Court of Appeals has ruled that in Kentucky a peace officer has such capacity where the crime is committed in his presence. That is a reasonable rule as the majority of states have concluded, which have ruled on the issue.

The State of Kentucky, under this Court's decision in Ker v. California, supra, has the legal right to select a rule which requires that the administrative determination of "prob-

able cause" on obscenity made by the police officer be examined judicially immediately after the arrest. The ever increasing judicial work load prevents this Court from fashioning a rule which would establish state and federal courts as the only forum for examining films, magazines, etc. in executing the administrative function of determining whether or not such subject matter is a proper subject for an obscenity charge. Further, such an arrogation of power would place a court in the position of a law enforcement officer or agency and would controvert rudimentary rules and principles which have been established to maintain a careful balance in the separation of powers. Were this Court to create such a rule, it would invite additional litigation and further appeals to this Court involving refinements to the new rule.

Society has a legitimate interest in suppressing crime and detecting criminals. That interest requires, (1) that the instrumentality of crime be preserved as evidence against alteration or destruction; (2) that autoptical evidence be preferred to testimonial evidence, and (3) that the reputation of the general authority of peace officers be maintained as a deterrent to crime.

It is generally recognized that the positive film print used to project images and sound can be easily altered to remove suspicious scenes. The pursuit of truth requires that the integrity of such evidence, as the instrumentality of the crime, be preserved for the trial of the matter where it may serve society as a means of freeing the innocent or convicting the guilty. The erection of another barrier for police to hurdle in their already difficult responsibility for curbing obscenity, would hinder rather than advance the natural development of such "police science."

It is unrealistic to claim that the right to seize a film as evidence can have a greater "chilling effect" on free speech than the right to arrest the person who is causing such projection. Since this Court has already confirmed that the latter right exists, it must also follow that the former right also exists. It would be an anomalous result for this Court to hold that an individual's personal liberty could be immediately arrested, but the inanimate instrumentality of the alleged crime could not.

There is nothing inherently wrong with a prior restraint resulting from a state criminal prosecution which is <u>timely</u> pursued. Here, the

21 days which elapsed between the arrest and seizure and the final determination by the trial court are well within permissible constitutional limitations.

This Court should pay particular attention to the special verdict of KRS Sect. 436.101(8) which offers a legislative solution to the impasse reached by this Court on the scienter issue in the Redrup case.

Amicus submits that, for all of the foregoing reasons, the judgment of the Kentucky Court of Appeals should be affirmed.

Respectfully submitted.

CHARLES H. KEATING, JR.,

Amicus Curiae.

A P P E N D I X "A"

MEMORANDUM OPINION OF

LOS ANGELES COUNTY SUPERIOR COURT

JUDGE L. THAXTON HANSON

Judicial review is a very proper and highly necessary part of our system of justice. This Court acknowledges the proper chain of duly constituted judicial authority. Therefore, it is the duty of this Court to comply with the writ issuing from the Second Appellate District. However, the fact that an Appellate Court issues an order does not necessarily make it right. Nor by complying with the writ does it mean that this Court agrees with or concurs in the decisions, actions or manner of handling by the State reviewing Courts. To the contrary, let the record reflect that it is the opinion of this Court that such decisions and actions have no basis in fact or law, logic, reason, and just plain common sense.

This matter, representing weeks of a Trial Court's time and the expenditure of thousands of dollars of taxpayers' money, presented important issues which have been disturbing and perplexing our Courts, the Bar and the public for some time; namely a delineation of the lines of judicial authority, vis-a-vis State and Federal Courts; and the resolution of "obscenity law" problems. In my opinion, the State reviewing Courts have fumbled

the ball. Both of these issues have been sidestepped and left unresolved by our reviewing courts, when the courts very existence is created, financed and maintained by the people for the prime purpose of decision making. Only by so acting can we expect to earn and retain the respect and confidence in our system of justice, which is so rapidly waning.

As to the lines of judicial authority, vis-a-vis State and Federal Courts, I have recently returned from the Graduate Course of the National College of State Judiciary, and while in seminar sessions with State Trial Judges from many States in this Nation, I was amazed to hear from my colleagues that the problem of Federal Court intrusion into State judicial processes is not limited to California, but this practice is a growing nation-wide problem plaguing the State judicial systems of many States. It is as if the Federal Courts have installed revolving doors with slipperty floors, and counsel scurry in and out, obtaining injunctions and orders from Federal Courts which throw a monkey wrench into State judicial procedures. This is interpreted by many State judges as a blatant Federal Court power grab which is clearly unconstitutional and which seriously hampers the efficient judicial processes

of the States. A railroad cannot possibly be run with someone continuously throwing a switch and side-tracking the main express. A fortiori -- how can a responsive and efficient State criminal justice system function with unwarranted Federal Court interference? The long-accepted doctrine of exhausting State remedies and the more recent "doctrine of abstention" must be adhered to.

This issue has not been decided in this case because, although the Federal Panel finally deferred to the State Courts, the Appellate Court "bellied up" by summarily ordering the Trial Court to conform to the Federal Order. Thus an opinion on this vital issue in this case has been short circuited by the Appellate Court, is apparently now moot, and a final determination by the United States Supreme Court will not be forthcoming.

As to the "obscenity law" issues, this matter came on in the ordinary course of the Court's official business. It has been and continues to be a "case," not a "cause." However, this Court has received literally hundreds of communications, written and verbal, from concerned citizens, professional people, lawyers, and judges - State and Federal - from California and from the far corners of the Nation, all supporting this Court's handling of this matter and expressing concern over

the flood of pornography. It has thus become apparent to this Court that the public, many trial courts and many attorneys are confused, upset and becoming very disillusioned over the delay by reviewing courts in resolving this problem. They desire a resolution of the problem, which is long overdue.

The reasons why this whole pornography problem should be faced resolutely and rapidly decided by the courts is reflected in the banner headlines of the Los Angeles Daily Journal:

Dateline June 2, 1972, "The Pornography Boom - A Growth 'Industry' in the Golden State";

June 5, 1972, "State Pornography Boom - Enter the Men from Organized Crime";

June 7, 1972, "Boom in Pornography - Many Arrests, but very few Convictions."

Further, evidence of widespread and deep-rooted disenchantment and concern in this area may well be found in the fact that State Senator John Harmer in only 17 days obtained 410,000 valid signatures to qualify an anti-pornography initiative which will appear on the November ballot.

The courts should ask themselves: Why must the people have to take this action? The present California Penal Code makes it a crime to sell and distribute obscene materials. Why are the

"obscenity laws" on the books not being enforced? Why are some 13,500 reels of hard-core pornography, found to be obscene after a full hearing and declared contraband, being ordered returned? Why? What is going on here?

The Federal Panel, without viewing the films or taking evidence, made a finding that "irreparable harm will result" if the seized "obscene" film is not returned to the owners. Division Four, Second Appellate District, in its unsigned findings of May 31, 1972, without viewing the film or hearing argument, unsupported by fact or law, held "the need for relief is urgent," i.e., to have the "obscene" materials returned to the owner. The basis for or the logic of these findings escapes this Court. The California Penal Code provides it is a crime to sell or distribute "obscene" materials. Where is the "irreparable harm?" Why the "urgent" need for relief? The criminal case, including a felony count for conspiracy, is still pending in the courts, and there is a provision in the California Penal Code for disposition of the materials by the Trial Court, if convicted.

This Court does not wish its comments to be misinterpreted. In my opinion, California has the finest judicial system in the Nation. Like many

other institutions which are experiencing problems -- the colleges, the churches, etc. -- the judiciary has not escaped its problems. This Court continues to have faith that the perplexing problems of the day will be resolved in a calm and reasonable manner within our judicial system. The sooner the better!

Nor does this Court intend its remarks to be interpreted as a broadside indictment of all Federal Judges or State Appellate Justices. The vast majority of them are solid, sound, hardworking jurists. Nor does it intend to impugn the integrity or sincerity of the Federal Judges or Appellate Justices who have passed on this matter. This Court respects their sincerity and their right to their opinions. However, this Court is entitled to its findings and opinions, based on its full and complete hearing. There is simply a complete divergence of opinion.

Judge Reluctantly Obeys Order to Return Sex Films

L.A. Valley News
August 8, 1972.

By PAUL WERTZ

The curtain dropped yesterday on a seven-month-old Van Nuys sex film case, but not before a Superior Court judge made it clear he is in disagreement with a state appellate court.

Judge L. Thaxton Hanson vacated his previous order that the county clerk's office hold more than 13,000 reels of sex movie film and bowed to an order by California's Second District Court of Appeal permitting the return of the films to the film makers.

Before issuing the new order, however, Judge Hanson had some stern words about the case.

"In my opinion, the state reviewing courts have fumbled the ball," the judge said.

Judge Hanson said the state appellate court "belled up" by ordering Hanson's court to comply with an earlier federal court order that all but three copies of each reel go back to the corporations which own and manufacture the sex movies.

Yesterday's decision was made under a Second District Court preemptory writ of mandate obtained by attorney Stanley Fleischman, who represents the film makers — Cinema Classics, Cal-Mail Inc., Secs, Inc., Movie-mat-Inc. and Pendulum Publishers.

Dep. County Counsel Michael Dougherty and

Continued on Page Ten

Continued from Page One

Dep. City Atty. Dave Schacter, both present yesterday in Van Nuys, said the California Supreme Court refused July 26 to grant a hearing on the Second District Court's opinion earlier this year that the county clerk's office may not hold all of the films.

The Second District Court's opinion was handed down after the case had bounced between federal and state courts on the issue of whether such a large volume of reels could be held pending court action.

Police armed with search warrants seized nearly 14,000 reels of movie film last December and January in separate raids in Los Angeles and the Hollywood area.

Investigators learned that the black and white and color films — carrying a street value of about $500,000 — were being sold via the mail for prices ranging from $40 per copy up to $1500 for one film.

The $1500 movie was a 16 mm color-sound film showing various sex acts.

Samples of the films were reviewed in open court by Judge Hanson, who watched three to four screens simultaneously in an effort to afford a judicial review of the material to determine if they were obscene.

The Van Nuys jurist conducted two weeks of review and actually screened about 350 sample films before declaring about 98% of the movies to fall within the State Penal Code definition of obscenity.

Meanwhile, however, Fleischman and associate attorneys obtained a federal court order mandating the release of the films. The order was issued before Judge Hanson.

When Hanson learned of the order, he completed the hearing, ruled the films to be obscene and later ordered the more than 13,000 reels seized and held by the county clerk's office as evidence.

Ruled Obscene

In reality, the films were not evidence in a pending criminal case until after the obscenity hearing, when three men were charged with conspiracy to distribute obscene material.

With Judge Hanson's order on the books and the films locked in the county clerk's vault, the attorneys for the film makers returned to the federal court and eventually went to the state Second District Court of Appeal to get their films back.

Dougherty and Schacter said yesterday the massive volume of movie reels, now stacked on pallets in the Old Hall of Records, probably will be turned back to the film makers tomorrow morning.

Before they left Judge Hanson's courtroom yesterday, both attorneys also had comment on the lengthy, lost battle.

Dougherty said the fact Judge Hanson was forced to vacate his order holding the obscene films is a "stupid result" of the legal fight.

Schacter maintained that the "people of the state of California have been denied due process of law."

"We have been denied our day in court," Schacter complained, referring to the several attempts to get a full hearing before the appellate courts.

Called "Depraved"

Judge Hanson said his court was the only one which "had to go through the indignity of reviewing this depraved material" and the local jurist expressed general disagreement with what he has termed the "interference" of upper courts in a state court matter.

The original federal District Court order came from a three-judge panel made up of Judges Walter Ely, of the U.S. Court of Appeals, and District Court Judges Jesse W. Curtis and Irving Hill.

The state appeal court's decision and order of last week came from Division Four of the state Second District Court of Appeal.

Because the original order of last June was unsigned, it is not clear if one or more of the state appeal court division's justices ruled on the case.

The justices in Division Four, located in Los Angeles, are Gordon L. Files, presiding justice; Robert Kingsley, Edwin C. Jefferson and Gerald C. Dunn.

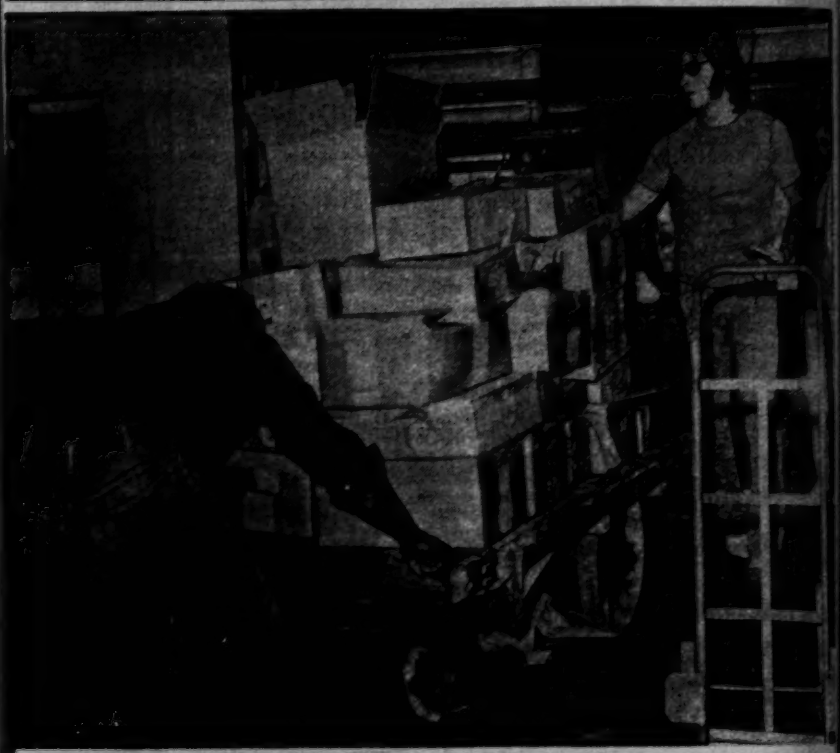
Judge Hanson sought yesterday to make it clear that his compliance with the upper court's order did not mean he agrees with the mandate.

Issue Unresolved

"To the contrary, let the record reflect that it is the opinon of this court that such decisions and actions have no basis in fact or law, logic, reason and just plain common sense," Judge Hanson said.

Judge Hanson charged that the issues of separation of federal and state court responsibilities and obscenity laws have been "side-stepped" by the reviewing courts "when the courts' very existence is created, financed and maintained by the people for the prime purpose of

★ Los Angeles Times Thurs., Aug. 10, 1972—Part I 3



OLLING BACK THE FILM—Cartons containing 8,000 reels of sex films are wheeled from the all of Records building after being ordered by judge to be returned to the owners. The films had been seized with the arrest of three distri tors, whose obscenity trial is still pending. three-judge federal panel ordered return of fil meanwhile, on the basis that seizure was ille

Times photo by Larry